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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC

WHEN: May 2, at 9:00 am
WHERE: Office of the Federal Register
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WHEN: May 21, at 9:00 am
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Room 305 B and C
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WASHINGTON, DC

WHEN: May 23, at 9:00 am
WHERE: Office of the Federal Register
First Floor Conference Room
1100 L Street, NW, Washington, DC
RESERVATIONS: 202–523–5240 (voice); 202–523–5229 (TDD)

NOTE: There will be a sign language interpreter for hearing impaired persons at the May 23, Washington, DC briefing.

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

RIN 3150-AA90

Access Authorization Program for Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to require an access authorization program for individuals requiring unescorted access to protected and vital areas at nuclear power plants. These amendments require an access authorization program that consists of three elements: Background investigation, psychological assessment, and behavioral observation. The required elements of the program have long been practiced in varying degree by most licensees as part of their Physical Security Plans. The Commission is adopting this final rule to provide increased assurance that the likelihood that unescorted access to protected and vital areas will be given to individuals whose background, psychological profile, or changes in behavioral pattern indicate a potential for committing acts that are, or could be, detrimental to the public health and safety will be minimized. These amendments, which will affect all nuclear power plant licensees, will result in high assurance that personnel granted unescorted access to protected and vital areas of nuclear power plants are trustworthy and reliable and do not pose a threat to commit radiological sabotage.

EFFECTIVE DATE: May 28, 1991 except for the information collection requirements contained in §§ 73.56(a) (1), (2), and (3), (b) (1) and (2), (c), (d), (e), (f) (1) and (2), and (h)(1). These information collection requirements will become effective upon OMB approval. The NRC will publish a notice of the effective date in the **Federal Register.**

ADDRESSES: The regulatory guide associated with the rule and the final regulatory analysis which includes cost-benefit analysis for the rule are available for inspection at the Commission's Public Document Room, 2120 L Street NW., (Lower Level), Washington, DC 20037. Requests for single copies of regulatory guides or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Distribution Section, Division of Information Support Services. Telephone requests cannot be accommodated. Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Dr. Sandra D. Frattali, Division of Regulatory Applications, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492-3773; for information of a legal nature, contact Robert L. Fonner, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492-1643.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 1984 (49 FR 30726), the Commission published, for public comment, a proposed rule to require a program for unescorted access authorization at nuclear power plants. Major elements of the proposed program included the requirement for background investigation, psychological assessment, and behavioral observation. A total of 142 comments were received that included comments from industry groups. These groups, including the Nuclear Management and Resources Council (NUMARC), the Edison Electric Institute, and later, the Atomic Industrial Forum, and KMC, Inc., suggested that the rule be withdrawn and proposed that it be replaced with an industry-developed initiative to commit voluntarily to the guidelines developed by NUMARC for an access authorization program. The response to these comments was provided in NRC staff paper SECY 85-381 which is available to the public as part of the regulatory history for the Insider Safeguards Rules at the Commission's Public Document Room, 2120 L Street, NW., (Lower Level), Washington, DC 20037.

As a result of these comments, the Commission directed the staff to develop, for Commission approval, a policy statement endorsing the guidelines entitled "Industry Guidelines for Nuclear Power Plant Access Authorization Programs" (hereafter referred to as "the Guidelines").

On March 9, 1988 (53 FR 7534), the Commission published a policy statement which proposed endorsing Revision 8 of these Guidelines. The Federal Register notice specifically invited public comment regarding the policy statement vs. rulemaking option.

The comment period was scheduled to expire on May 9, 1988. However, comments were received subsequent to that date and were also considered. In all, 71 letters of comment were received representing 68 different individuals or groups. The Commenters consisted of 14 unions, 39 utilities and utility organizations, 5 contractors, 5 commenters with credentials in psychology, 3 individuals, 1 State government agency, and 1 member of Congress. The comments addressed both the policy statement and the Guidelines.

Based upon the comments as a whole, there appeared to be broad public acceptance for the general concept of a standardized access authorization program at nuclear power plants. Of the 14 union commenters, the 13 who addressed the issue of policy statement versus rule favored a rule, and 1 expressed no preference. Of the 39 utilities and utility organizations, 37 favored the policy statement, 1 favored the rule, and 1 expressed no preference. Of the five contractors responding, three favored a policy statement, and two expressed no preference. Of the 5 commenters with credentials in psychology, 2 favored a policy statement, 2 favored a rule (one of these is also an industry contractor), and one expressed no preference. Of the three individuals who indicated no affiliation, 2 favored a rule, and 1 favored a policy statement. Neither the comments of the member of Congress, nor the State

government agency addressed this question.

Most of those who preferred a rule over a policy statement generally did not take issue with elements of the Guidelines but considered them so prescriptive as to be tantamount to a rule. Comments were made to the effect that regulation by rulemaking was preferable to regulation by policy statement, particularly where there was the possibility of conflict with State laws.

The rulemaking option was also preferred because (1) a regulation would have the advantage of providing for the kind of direct oversight the NRC has over other aspects of reactor safeguards (physical protection, fitness for duty, guard training, and contingency plans), and (2) a regulation would ensure a well-defined machanism for the NRC to correct deficiencies promptly and effectively.

Implicit in the comments of those who preferred the policy statement option was the importance of supporting industry initiatives and industry-developed programs and minimizing regulatory interference in issues they don't believe have a significant impact on public health and safety.

The Commission decided to proceed with a final rule and on April 19, 1989, the NRC staff was directed to prepare a final rule to require access authorization programs at nuclear power plants, which would specify the major attributes required of the program. The Commission also directed that a regulatory guide accompany the rule. The regulatory guide would endorse the latest revision of NUMARC Guidelines, with appropriate exceptions, as one acceptable means of complying with the rule.

Rationale for Rulemaking

The Commission recognizes the need for an effective access authorization program with appropriate oversight that is implemented throughout the industry, a position strongly supported by the public comments. The implementation of the access authorization rule will increase the assurance that only reliable and trustworthy individuals will have unescorted access to nuclear power plants. The present rulemaking and associated regulatory guide will specifically provide increased assurance that individuals granted unescorted access to protected and vital areas are trustworthy and reliable and do not pose a threat to commit radiological sabotage by:

1. Establishing minimum requirements for access authorization programs in an enforceable manner.

2. Ensuring that licensees not implementing such minimum requirements improve their programs.

3. Providing assurance that those portions of voluntary and improved programs developed and implemented in anticipation of regulatory action which are consistent with the rule are not degraded for the lifetime of the plant.

The access authorization rule requires each licensee to establish and maintain a program designed to minimize the probability of authorizing unescorted access to protected an vital areas for employees whose background, psychological profile, or changes in behavioral patterns indicate a potential for committing acts that are, or could be, detrimental to the public health and safety. The main features of the licensee's program must include:

1. The background investigation designed to identify past actions which would call into question an individual's trustworthiness and reliability to be permitted unescorted access to a protected or vital area of a nuclear power reactor.

2. The psychological assessment designed to evaluate the possible impact of any noted psychological characteristics which may have a bearing on trustworthiness and reliability.

3. Behavioral observation designed to detect individual behavioral changes which, if left unattended, could lead to acts detrimental to the public health and safety.

These three elements of the unescorted access authorization program are not separate, stand-alone elements. Rather, they are mutually reinforcing segments of the overall program. The information developed in any one of these facets is combined with data from the other two to provide the best possible evaluation of an individual's trustworthiness and reliability. Any complete evaluation of an individual satisfies all three elements of the program by reviewing the relevant features of the past, examining the current psychological state, and then verifying the continued trustworthiness and reliability through observation. Together, the synergism of these three elements provides the strength and value of the unescorted access authorization program and results in increased protection for the public health and safety. Additionally, the rule provides for grand-fathering of existing access authorization, temporary and reinstated access authorization, and transfer of access authorization. Further the rule allows relaxation of access requirements with appropriate compensatory measures during periods of cold shutdown. The rule also provides for a review procedure when denying or revoking access authorization.

The rule is accompanied by a regulatory guide that describes a program acceptable to the NRC for complying with the requirements of the rule. The regulatory guide endorses, with specific exceptions, "Industry Guidelines for Nuclear Power Plant Access Authorization Programs, Revision 89–01, August 1989," which is provided as an appendix to the regulatory guide. Exceptions to the Guidelines concern the review procedure, and grandfathering.

Licensees will be required to incorporate an access authorization program into their NRC approved Physical Security Plan on the schedule provided for by the regulation. Appropriate revisions to the Physical Security Plan, for example, a commitment to follow and implement the guidance contained in the regulatory guide, will be implemented under the provisions of 10 CFR 50.54(p)(2).

As has already been pointed out, the elements of the access authorization program have been published for public comment twice, once in 1984 in the proposed rule, and once in 1988 in the Guidelines, Revision 8, which were included as an appendix to the NRC proposed policy statement. Extensive public comments were received on both occasions. The attributes of the access authorization program being promulgated in the final rule and the program endorsed by the associated regulatory guide are the direct results of the extensive public comments on the proposed rule and the proposed policy statement. It is noted that in requesting comment on the proposed policy statement the Commission did not withdraw the proposed rule, but deliberately left it in place as a viable option. The complete response to the public comments made in 1984 is included in NRC Staff paper SECY 85–381 in the Insider Safeguards Rules regulatory history which is available to the public in the Commission's Public Document Room.

The proposed rule, published in 1984, included the requirement for a separate Access Authorization Plan. Because licensees' Physical Security Plans currently include an access authorization program, a requirement for a separate plan is now deemed unnecessary. The access authorization program specified in this rulemaking and its associated regulatory guide will be implemented as part of the licensees' Physical Security Plan. This change, which is administrative in nature, will

also minimize the impact and costs both in funds and manpower to the utilities and the NRC in implementing this program.

Comments in response to the proposed policy statement published in 1988 were received on both general issues and the access authorization program put forward in the Guidelines. The public comments concerning the rule vs. policy statement option have been addressed earlier in the text. Because it is the Commission's intention to publish a regulatory guide endorsing the Guidelines as one means of complying with the rule, those comments concerning the Guidelines are addressed below in this context. The public comments made in 1984 which are pertinent to the current rule are also included. These public comments were available to NUMARC, who made changes to Revision 8 of the Guidelines as a result. The regulatory guide endorses, with exceptions, this revision which is identified as 89-01, August 1989.

The Access Authorization Program

A discussion of the access authorization program which includes an evaluation and response to public comments follows:

I. Attributes.
I.1 Background Investigation.
I.2 Psychological Assessment.
I.3 Behavioral Observation.
II. Exceptions to the NUMARC Guidelines.
II.1 Review Procedure.
II.2 Grandfathering.
III. Other Provisions.
III.1 Evaluation Criteria for Unescorted Access.
III.2 Temporary Unescorted Access Authorization.
III.3 Transfer and Reinstatement of Unescorted Access.
III.4 Exemptions.
III.5 Contractor and Vendor Requirements.
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III.7 Access Authorization During Cold Shutdown.
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IV. General.
IV.1 Relationship to Fitness for Duty.
IV.2 Standardization of Requirements.
IV.3 Failure to Include the Bargaining Unit.
IV.4 Responsibility for Revisions to the Guidelines.

I. Attributes

The unescorted access authorization program includes a background investigation, psychological assessment, and behavioral observation. The background investigation and the psychological assessment are designed to identify past actions or psychological characteristics that would call into question an individual's trustworthiness and reliability to be permitted unescorted access within a protected or vital area of a nuclear power reactor. Behavioral observation is designed to detect individual behavior or behavioral changes within the context of the job environment which if left unattended could lead to acts detrimental to the public health and safety.

I.1 Background Investigation

Many comments were made concerning the difficulties involved in obtaining all the information required for the background investigation. The commenters believe that specific language should be added to the Guidelines so that a utility need only make a reasonable attempt to address the applicant's employment history, education history, credit history, criminal history, military service, and character and reputation. The Commission believes that the language in the Guidelines is adequate to assure that "best efforts" are made in this regard.

(a) Employment History. A number of commenters commented that there are some instances in which no matter how much effort is expended, the information needed for the employment history is not obtainable because the previous employer will not release it, cannot release it, is out of business, or did not keep records on former employees. Particularly with respect to a former employee's disciplinary history, commenters pointed out that many corporations will not or cannot furnish reasons for termination or other qualitative information to a prospective employer, even with written authorization of the subject individual to do so. In their experience former and present employers refuse to divulge this type of information because of fear of litigation by the applicant. For this reason they believe that the Guidelines should include a clause relieving the licensee of this burden if a good faith attempt has been made to obtain the data and that the utility be given the right to determine whether or not it has sufficient information to make a reasoned decision to grant access authorization. Specific language concerning what can be done in this case has been added to the Guidelines by NUMARC. Moreover, the Commission must be satisfied that the utility has made a good faith attempt to obtain records and has sufficient information to make a decision. Specific language as to how to document these attempts has also been added to the Guidelines.

One commenter stated that the use of disciplinary history was questionable at best and should be severely restricted. The commenter believed this information was very subjective and highly dependent on the person using it and, as such, served no useful purpose. The Commission does not agree and believes that this information is a useful input to the total process of deciding a potential employee's reliability and trustworthiness.

(b) Educational History. Several commenters commented that verification of educational history should not be required on positions that do not require education, such as unskilled labor. One commenter stated education not required for employment had no value and therefore, did not need to be verified. Another set of commenters stated that this section should be limited to confirming enrollment in degree programs because of the unnecessary burden required to verify every single course an individual might have taken. The Commission believes that all claimed education during the preceding 5-year period should be verified with the objective, in this program, of establishing whether any significant false statements have been made, and the provision has been retained in the Guidelines.

(c) Criminal History. One commenter requested that contractors and vendors be allowed to use the program for the FBI criminal history check specified in 10 CFR 73.57 on an equal basis with part 50 licensees. The Commission notes that this is not possible because the authority for 10 CFR 73.57 is derived from Public law 99-399, "The Omnibus Diplomatic and Anti-Terriorism Act of 1986" which limited the program to nuclear power reactor licensees. Only utility licensees can request criminal history checks through the NRC.

Many commenters noted that because individuals with a Q clearance are exempt from fingerprinting in accordance with 10 CFR 73.57(b)(2), the same individuals should be exempt from the criminal history check portion of the background investigation. The Commission notes that individuals with a Q or L clearance have been fingerprinted and have had a criminal history check. NUMARC added the language exempting Q cleared individuals from the criminal history check to the Guidelines although a specific exemption is unnecessary because the exemption already exists under 10 CFR 73.57(b)(2). The Guidelines specify that the criminal history record check be through the Federal Bureau of Investigation in accordance with NRC regulations. Comments were received identifying that in some cases the criminal history records of the State or

local authorities were more complete and a check of these records should also be performed in those cases. The comment was made that some licensees who were presently checking State and local criminal records might choose not to make these checks after the rule was implemented. The Commission considers that criminal history records checks through the Federal Bureau of Investigation, in the context of the complete access authorization program, is the best overall approach to check criminal history and that it would be impractical, through rulemaking, to specify case by case variances to this approach. Licensees would not be precluded from including in their program, checks of State and local criminal records.

(d) Military Service. Many commenters stated that, because all United States military personnel are provided with an original DD214 upon discharge from the service, this form should be sufficient for verification of military service. The Commission does not agree with the comments that it is relatively easy to determine whether this form has been altered. Verification from the National Personal Record Center (NPRC) is appropriate as provided for in the Guidelines. Others expressed concern that the NPRC would be unable to supply necessary information concerning military service within the 180 days allowed for interim access. They believe the 180-day limitation for this section should be removed as it is not crucial since the other elements of the program will have been met. If the 180 days is not sufficient for response, an additional exception can be given under conditions provided for in the Guidelines.

The Guidelines discuss confirmation of military service specifically with regard to service in the United States military. This is not to be interpreted as meaning that military service for a foreign government does not have to be verified. A good faith attempt to verify any claimed military service for a foreign government is part of the background investigation.

(e) Character and Reputation. One commenter believed that the phrases "susceptibility to coercion," and "any other conduct relating to an applicant's trustworthiness or reliability to discharge job duties within the environment of a nuclear power plant," in the Guidelines have unlimited interpretation, and as such, are not useful in evaluating character. The Commission does not agree and believes these are useful elements in evaluations. Another commenter stated that to improve the quality and uniformity of the controlled substance evaluation, a chemical test for illegal drug usage should be specified. This is an element of the Fitness for Duty rulemaking, not the Access Authorization Program.

(f) Credit Check. Comments were made that credit, or lack of credit, should not be a factor in granting unescorted access. One utility commenter believes that this requirement is of very little benefit in evaluating an individual's reliability and trustworthiness. This utility said it would find it difficult to disallow unescorted access to an individual with no criminal history record who was a poor credit risk. Further, a comment was made that a financial expert would be required to determine whether an individual was, in fact, in sufficient financial difficulty to believe that he or she would be subject to coercion. Another commenter commented that this section did not provide guidance as to what credit history information would constitute grounds to deny access. In addition, other commenters commented that criteria to evaluate the information received from the credit check would be difficult to establish, and the licensee would have to be very careful about basing decisions affecting employment on credit information. They recommended that, if a credit check is considered necessary at all, it should be limited to current credit status. Still others pointed out that this section did not state what period of time the credit check should include, either five years or since the eighteenth birthday. The Commission concludes that it is appropriate to continue to include a credit check in the background investigation, because the Commission believes that a higher degree of assurance is obtained that applicants for unescorted access to nuclear power reactors are reliable, trustworthy and do not now have and have not had in the recent past any significant financial problems which would make them susceptible to pressures, blackmail or coercion to commit acts that might result in radiological sabotage. Therefore, the Commission believes that a credit check does have value within the total access authorization process but that it should not, by itself, be used to deny access authorization. Limiting the check to the current credit status is not considered sufficient. Past credit history is also considered as yet one more piece of useful information in making an assessment regarding financial problems. If a credit bureau check does not reveal the requested information, the Guidelines require the additional step of contacting the personal credit references listed by the applicant or developed by other contacts.

I.2 Psychological Assessment

When the proposed rule was published in 1984, over 60 letters of comment were received on this subject, the majority of which came from behavioral science firms, individual psychologists and psychiatrists, and a number from members of the academic community. When the proposed policy statement was published in 1988, there were only six commentors who addressed this subject specifically, of whom five had credentials in psychology. Almost all of these commentors supported the use of psychological assessment as an important screening tool. In 1984, a substantial number of comments were also received from licensees and industry trade groups. The large majority of these comments also supported psychological assessment. However, not all thought it should be included as a regulatory requirement. A minority of commenters did not support the use of psychological assessment as a screening tool. Comments received from the National Institute of Mental Health (NIMH), Department of Health and Human Services noted that psychological assessment could provide some useful information about the emotional stability of persons given access to a nuclear power plant environment but noted this type of testing has questionable predictive value. The Commission agrees and for this specific reason has proposed a three component screening program consisting of investigation of an individual's past, assessment of the individual's current psychological state, and behavioral observation in the work environment to detect changes in the individual's behavior. The Commission support for the inclusion of psychological assessment as a required component of the access authorization program takes into account the consensus received from the professional community and the fact that it is a component of the access authorization program in both ANSI 18.17 and its revision, ANSI 3.3.

After much deliberation by the Commission, the proposed rule, published in 1984, included psychological assessment. The Commission expressed particular interest in receiving public response to eleven questions concerning this issue that were set forth in the supplementary information section of the proposed rule. A brief summary of public response to each question is provided in NRC staff

paper SECY 85–381. A detailed analysis of public responses received for these questions was also prepared and may be examined in the Commission's Public Document Room. The results of these public responses support the Commission position concerning the inclusion of psychological assessment in an access authorization program.

This rule requires that a psychological assessment be conducted according to professionally acceptable procedures and practices. The NUMARC Guidelines do so in that they require a reliable written personality test or any other professionally accepted clinical evaluation procedure with the results of the test or procedure being evaluated by a qualified, and if applicable, licensed psychiatrist or psychologist.

The proposed policy statement generated comments from 5 commenters with psychological credentials, all of whom supported the concept of psychological assessment. One of them did give examples of what he considered to be abuses he had observed at specific NRC licensed facilities and was concerned that the program should be careful to protect the rights of the individuals involved. The rule does require a review procedure and protection of information.

With regard to the value of psychological testing and evaluation, these commenters supported the concept of generally accepted tests properly administered as a tool in the clearance process. The Commission agrees that no person should normally be denied access solely on the basis of a psychological test or tests. Any test must be regarded as a screening instrument with all anomalies being resolved according to professionally accepted procedures and practices.

Comments made on both the proposed rule and proposed policy statement indicated that while the psychological test used is required to "* * * have been proven to be valid * * *," no written tests have been validated for the nuclear environment. The Commission agrees, and the rule no longer requires a test. The Guidelines, however, allow the use of tests designed by the licensee to assess the applicant's reliability and trustworthiness as part of the psychological assessment. If the testing indicates that further evaluation needs to be made, the assessment will be complemented by an evaluation by a qualified and, if applicable, licensed psychologist or psychiatrist.

One comment on the Guidelines, Revision 8, recommended that medical personnel be permitted to perform the psychological assessment function, because some States permit licensed medical personnel, other than psychologists or psychiatrists, to perform psychological assessments. However, by far the greatest number of comments on this issue indicated that the Guidelines should be more restrictive, rather than less, in determining who should perform psychological assessments. They supported limiting those qualified to evaluate results of psychological assessments to board certified psychiatrists or psychologists, not simply medical personnel or uncertified psychologists. Their belief was that the view of other psychiatrists and psychologists, which is required for board certification, would give employees more protection against faulty psychological assessments. This could prevent a potentially unjust loss of employment. The Commission agrees with the conservative position reflected in the Guidelines. The comment from a member of Congress also supported the continued use of qualified psychologists as well as psychiatrists.

One commenter stated a particular psychological test should be specified, and it should be the Minnesota Multiphasic Personality Inventory (MMPI). It is not the intent of the Commission to recommend a particular test. Another commenter said that a preferred screening program should use a variety of tests, each of which should meet American Psychological Association standards or their equivalent. The same commenter who recommended a variety of tests cautioned the industry to note that reliability and trustworthiness are difficult traits to assess and are not readily measured by any single test or evaluative tool. It is up to the utilities who use psychological testing to assure that any test or tests used are appropriate in accordance with the Guidelines.

The psychologists who commented believed that a proper screening program should include a clinical interview for each person screened, but agreed that interviewing by exception may represent a reasonable compromise between thoroughness and cost. The Commission agrees and this is the approach taken in the Guidelines.

One psychologist commented that it is important to ensure that a utility company is not deprived of highly competent personnel who, in fact, are emotionally stable. In his opinion, the MMPI and a one hour interview did not constitute a thorough psychological assessment. He believes a noncertification decision must be viewed as a tentative one that should be reviewed by another qualified psychologist or psychiatrist, not by management. It is the practice of the utilities to have a second professional opinion, but the Commission believes that the final decision should be made by management.

One commenter proposed that several levels of access authorization should be specified based on job category or that a reevaluation of access authorization was necessary when an employee receives a substantial promotion. The commenter thought it unrealistic to believe that the same emotional stability criteria could be used in evaluating all employees at all levels of employment. The Commission believes that while this may be a valid point, it is impracticable to require several levels of psychological testing. The Commission believes that the behavioral observation program sufficiently provides ongoing assurance of stability after promotion.

Several commenters pointed out that after beginning the initial screening evaluation of an individual the utility may terminate the process. Clarification in the language of the Guidelines concerning this was requested. NUMARC has provided clarification in the current revision of the Guidelines, Revision 89–01, August 1989.

1.3 Behavioral Observation

Many commenters endorsed the principal of a behavioral observation program which in the Guidelines is referred to as a "continual behavioral observation program." Only one commenter strongly objected to the behavioral observation program stating that it could easily be subject to abuse, making amateur psychologists out of supervisors or others with no background or training in psychology. Several comments indicated that only supervisors should be the observers and that they need to be provided with proper training, including refresher training, in order to be effective. While the Commission agrees that supervisors are not psychologists, the behavioral observation program is necessary. The Commission believes that with training, as provided for by the Guidelines, supervisors can be good observers. Furthermore, the final decision concerning access authorization will be made not by the supervisor but by higher level management in conjunction with a qualified psychologist or psychiatrist if a new psychological assessment is made.

Other commenters expressed the opinion that the behavioral observation program would not be useful for temporary employees as there is not enough continuity to provide meaningful

observation. These commenters wanted the policy to clearly permit the utility to use a contractor's or vendor's behavioral observation program. The Commission believes that the behavioral observation program is useful in detecting long term patterns and impairments, as well as in evaluating recent behavior changes, and therefore, it is useful. The Commission believes that the details of how this program is implemented can be left to the discretion of the utility whose responsibility it is to determine whether to grant the unescorted access.

Finally, one commenter commented that the requirements that the person having unescorted access authorization must be notified of his/her responsibility to report any arrest that may impact upon his/her trustworthiness may not be legal. In addition, the commenter commented that, as worded, this section also implies that the individual has the responsibility of determining whether the arrest impacts upon his/her own trustworthiness. The Commission notes, however, that, as a condition of employment, requiring reporting of arrests is not unusual, and this requirement is retained in the program. After the arrest is reported, it will be evaluated as to how it will affect the individual's continued access authorization.

II. Exceptions to the NUMARC Guidelines

The rule explicitly differs from the Guidelines in two areas: The review procedure, and the grandfathering of existing access authorizations. In these instances the rule overrides the provisions of the Guidelines as recognized in the regulatory guide.

II.1 Review Procedure

In the comments on the proposed policy statement, concern was expressed that the review procedure required by the Guidelines did not sufficiently protect the worker's interests. The review (appeal) procedure included in the proposed rule was preferred. The language of the Guidelines in Revision 8, which was published with the proposed policy statement, provided for a minimal review procedure or any "alternative process which is independent and impartial." It should be noted that the Commission never intended that any review procedure that already exists in a bargaining agreement be abandoned. The current version of the Guidelines, Revision 89–01, August 1989, does clarify this.

However, the Commission has decided to retain the requirement for the review procedure in the rule itself. The review procedure in the Guidelines extends only to "permanent employees of the utility." The rule requires licensees to provide, at the request of the affected employee, a procedure for the review of a denial or revocation of access authorization which adversely affects employment of a permanent, as well as temporary, employee of the licensee, contractor, or vendor. The procedure must provide the individual information on the grounds for the denial or revocation and an opportunity for an objective review of the information in which the denial or revocation was based. However, unescorted access may not be granted during the review process.

A similar review procedure that was included in the proposed rule elicited several strong comments from electrical generating utilities with nuclear power reactors. The comments were uniformly negative, and made three main points: (1) The Commission has no authority to promulgate a review requirement in conjunction with the access authorization rule, (2) the review requirement is not necessary because aggrieved employees have other recourse under existing law, and (3) the review procedure intrudes upon licensee's management prerogatives. Most of the utilities simply stated their objections without elaboration. Edison Electric Institute, on the other hand, submitted an extensive brief in support of the utilities' position.

The Edison Electric Institute brief relied principally upon *Jackson* v. *Metropolitan Edison Company*, 419 U.S.C. 345 (1974), for the proposition that the Commission has no authority to require a review procedure. In that case, the Court established the principle that there had to be a sufficiently close nexus between the state and the action of the regulated utility before the latter could fairly be viewed as state action requiring due process protection. Of considerable importance is whether the government put "its own weight on the side of the proposed practice by ordering it." Id. at 357. The industry argues, "At bottom, there is no state action involved because the government does not compel action against any employee; it only compels the employer to establish a framework for making its own assessments about its employees."

The Commission need not resolve whether, under this access authorization program, licensee decisions on access would be regarded as governmental action requiring due process protection, because the Commission does not base the requirement for review procedures on a need to comply with constitutional due process requirements. Rather, the Commission sees the review procedures required by the rule as necessary to assure effective access monitoring by licensees. Therefore, the Commission has authority to impose these procedures because they will further the safety interests addressed by the access rule.

The effectiveness of the program will depend on the accuracy of the information that forms the basis for access authorization decisions and on the perception of the licensee's employees that the program is a fair one worthy of their cooperation. The review procedures mandated by the rule are responsive to both these concerns. They provide a necessary additional assurance that where access is denied there is a sound basis for the decision and that mistaken access denials, which could undermine the quality of a licensee's work force and thereby counter the interests of safety, will not stand uncorrected. Furthermore, the use of even-handed fact-finding procedures, irrespective of due process clause considerations, should assure both the appearance and substance of fairness, which the Commission believes are necessary for an effective program.

In the Commission's view, it is not sufficient reason to dispense with the review procedures simply because there are other remedies that are available to the aggrieved person. Although in theory an aggrieved individual could commence an action in a State or a Federal court, such litigation could be costly and time-consuming for the average employee. In addition, the Commission has not seen evidence that union collective bargaining agreements (where they exist) would automatically include denial or revocation of access authorization as a grievable action. In any case, the latter would not be available in nonunion plants. Further, if procedures under collective bargaining agreements are readily available for this purpose in the absence of a required review procedure, as the Edison Electric Institute argues, there is no basis for objection to the review portion of the rule in unionized plants, since the rule would allow the use of a grievance procedure for review of denials or revocations of access authorizations.

Several other comments on the portion of the rule requiring a review procedure did not address basic questions of authority and necessity but rather the form of the rule itself. The

comments and the response thereto follows.

A third party (i.e., an independent adjudicator) should not be deciding disputes over access authorization. An independent adjudicator could allow access to the plant to a person whom the utility management believes may present a serious threat to plant security. The Commission notes that the required review procedure applies only to employees denied access authorization on the basis of the program elements in the rule itself. The rule does not preclude utility management from denying access to an employee for reasons not subsumed under the mandated program. In addition, if the evidence indicates a proper application of relevant criteria in excluding an employee, the review procedure, if utilized, should result in a decision vindicating the management action.

A nonunion utility expressed a concern that the review procedure may inject an adversarial note into an employment relationship based on mutually shared assumptions of trust between managers and employees. Another nonunion utility mentioned that for decades it has had an impartial and objective company procedure that has acceptance of management and employees. Such company procedures are acceptable under the rule, provided the minimum requirements of fairness are met. These minimum requirements include adequate notice, a fair hearing, and an impartial decisionmaker. The latter can be a trusted employee, a member of the management team, or an outsider. The critical element is that the decisionmaker's own status within the company not be affected by his or her decisions, whether rendered for or against the company.

One commenter was concerned that application of the procedure to a denial of access authorization meant that it applied to persons not yet employees. The review procedure applies to both denial and revocation, but only in reference to employees. The access authorization rule is not written as a preemployment screening device. It applies to persons who are employees of the licensee (or its contractors or vendors). Although the utility may make eligiblity for unescorted access to plant vital equipment and protected and vital areas a precondition of employment, under the rule the actual grant of access authorization or its denial comes after the employment relationship has been established, not before.

II.2 Grandfathering.

The Guidelines allow grandfathering of any individual holding a valid access authorization either on the date of the implementation of the rule or anytime during the previous 365 days. This would allow for the possibility of grandfathering without either a complete screening or a sufficient meaningful period of behavioral observation. To eliminate this possibility the rule provides that only those individuals may be grandfathered who have had an uninterrupted access authorization for at least 180 days on the date the final rule is published in the **Federal Register.**

One commenter commented that employees who had nuclear and fossil fuel generating station experience, worked for the same company, and were members of the same union, able to work in either a fossil fuel or a nuclear plant should not be subjected to update requirements by the behavioral observation program. The Commission disagrees, and notes there are higher standards for nuclear power plant operations than there are for nonnuclear power operations. A behavioral observation program is necessary for employees to retain their access authorization.

Another commenter wanted clarification of whether a contractor or vendor employee's unescorted access at one utility on the date of implementation of the access authorization program at that utility could be grandfathered to another utility. Grandfathering is not transferable. The rule provides for grandfathering only at the utility where an individual has been working for the 180 days prior to the rules publication in the **Federal Register.**

III. Other Provisions

III.1 Evaluation Criteria for Unescorted Access

Comments were made that the criteria are inadequate. Concern was expressed that, without specific criteria, noncertification policies are likely to emerge from trial and error which will be unfair, inconsistent, and difficult to validate, and that utility companies probably will experience greater vulnerability to litigation. The Commission believes that the evaluation criteria given in the Guidelines, Revision 89–01, August 1989, as endorsed by the regulatory guide are specific enough for the utility to apply fairly and consistently.

III.2 Temporary Unescorted Access Authorization

This rule contains a provision for a temporary unescorted access program. This satisfies the concerns of many commenters who wanted to ensure that temporary unescorted access authorization capability remains a valid element in security plans in accordance with the NRC's Generic Letter 87–10.

The temporary unescorted access authorization for both permanent or temporary employees may be used when there is a good reason for expediting employees' unescorted access authorization. The rule requires that this temporary authorization, which is good for a maximum of 180 days, satisfies certain conditions, i.e., the licensee shall have verified the person's identity, initiated the background investigation (including submittal of fingerprints to the FBI through the NRC), completed an employment check for the past year, obtained the recommendation of a developed character reference, conducted a credit check, and completed the psychological assessment. A licensee should grant an employee only one temporary access authorization for 180 uninterrupted days. Any longer access authorization is not "temporary." Using this provision to allow back-to-back temporary access authorizations for an employee by the same licensee to circumvent the normal requirements for unescorted access would be a misuse of this provision.

Many commenters commented that the credit check should not be included as a requirement for granting temporary access authorization because it lengthens the time required to complete screening for temporary access while typically yielding very little useful information. One commenter stated that psychological assessments as well as credit checks are not necessary for temporary access authorization and considered the cost to implement these elements to be excessive. The Commission believes that the credit check and psychological assessments are necessary and must be completed before temporary access is granted.

III.3 Transfer and Reinstatement of Unescorted Access

Comments on contractor and vendor programs also concerned the transferability of access authorization. The majority supported retaining transferability; however, one commenter disagreed. The Commission is retaining transferability because if an individual's access authorization is done properly,

there is no need for or advantage in repeating the process.

One commenter stated that because the psychological assessment, as well as background investigations, established only initial reliabilty of an employee and it was the purpose of the behavioral observation program to establish the continuing reliability of that person, a 365 day break in behavioral observation could significantly compromise public health and safety. The commenter believes that psychological retesting should be required upon a break in continual behavioral observation. Another commenter suggested that there should be some information to indicate that the person was not, during his or her absence, either in jail or in a psychiatric ward. The Commission believes that this is a valid point but that requiring a complete psychological assessment and background investigation after every break in the behavioral observation program is not feasible and there is information available to licensees from other sources. For example, if the access authorization is lost because of a leave of absence, it was reasonable to assume that the reason for the leave of absence is known to the licensee, and that a licensee has some indication of the activities of the employee during this period. Prior to reinstatement of the access authorization, it is expected that licensees will ascertain that these activities would not affect the employee's trustworthiness and reliability.

Two commenters strongly endorsed the Guidelines provision which allows transfer or reinstatment of unescorted access if this access was favorably terminated within 365 days. Some time period to allow for transfer and reinstatement needs to be specified, and one year is considered reasonable.

III.4 Exemptions

Several comments were received regarding the stipulation in the proposed rule that licensees are to grant unescorted access authorization to employees of the NRC who had been designated to meet the intent of the requirements of § 73.56. Although some elements associated with the L and Q, as well as the R and U, clearance programs of the Commission are not identical to elements in the access authorization program, the Commission does not believe that any change to the proposed rule is needed as to the treatment of NRC personnel. In exercising its prerogative to certify that these persons have met the intent of the requirements of the proposed rule, the Commission has given due consideration to the fact that persons who have been designated by NRC are subjected to government-administered background investigation programs that go beyond the investigations required of licensees. These persons are also subject to periodic reinvestigations. Because these government administered programs are deemed the equivalent of the program required by this rulemaking, a specific exemption for persons designated by the NRC is included.

The Department of Nuclear Safety of the State of Illinois requested that appropriate State employees and contractors also be exempt from a licensee's program. It is not the intent of the Commission to exempt anyone from an access authorization program other than persons designated by the NRC. The Commission believes that the issue of whether a state's access authorization program is acceptable to a licensee as meeting the intent of the licensee's program is an issue to be resolved by the licensee and state officials.

III.5 Contractor and Vendor Requirements

One commenter wanted the policy to clearly permit the utility to adopt all, or any part of, a contractor's screening or behavioral observation program. In instances where Guidelines were not met by the contractor's program, the utility would have responsibility for supplementing it with the utility's own program. The Commission agrees that if the components of a contractor's or vendor's program meet the requirements of a licensee's access authorization program, those components may be accepted at the licensee's discretion. One commenter stated that unions needed the right to request records to facilitate audits. The Commission notes that the unions do not have the status of independent auditors in order to audit contractor programs. Unions are not impartial with regard to issues between representated employees and management. However, the Commission has no objection to a union reviewing an independently performed audit. The Commission considers that this is a matter that can be negotiated between the unions and utilities during the bargaining process.

Contractors or vendors who have their own programs based on the regulatory guide may find an employee does not meet the requirements for unescorted access authorization. Effectively, the contractor or vendor can deny their own employee access to the plant. However, it should be noted that the ultimate responsibility of denying or granting access authorization to an individual resides with the licensee.

III.6 Audits

There were a number of commenters who thought that the audit cycle for both utility audits and contractors and vendor audits should be three years. This cycle would be equivalent to that required for quality assurance programs specified in Regulatory Guide 1.144. The Commission believes that the comparison is invalid, and that each program's auditing frequency must be judged on its own merits. Concerns were expressed by commenters regarding what constituted an independent evaluation. One commenter pointed out that there is no procedure given by which the NRC, the agency responsible to the government and the public for ensuring safe and secure operation of power plants, is required to be informed or to ensure that corrective action is taken if defects are noted by the "independent" evaluation. This commenter stated that the policy should (1) specify NRC monitoring and control, (2) specify criteria for the independence of auditors, and (3) specify that the NRC's overview of the auditor's evaluation be exercised at least once per twelve month period. Other commenters requested clarification of what constituted an independent evaluation, i.e., someone outside the utility or the utility's own quality assurance department. One commenter specifically questioned whether the independent evaluation could be satisfied by a utility's own quality assurance program, so long as it functions independently of the group responsible for the access authorization program. One commenter said that using the utility's quality assurance program would be reasonable because independent evaluation by an outside organization was an unnecessary burden. Another stated that an independent evaluation was an unnecessary expenditure of resources, and independent evaluation of the program should properly be provided by and "in fact" would best be provided by the NRC's normal inspection programs. Further, this commenter believed that delegation of responsibility for assuring and verifying compliance by a third party other than the NRC is inappropriate, and perhaps risky. The Commission believes that an independent evaluation is a reasonable requirement which could be met by a utility's quality assurance if the persons conducting the evaluation are qualified and functionally independent of those responsible for implementing the Access Authorization Program. What constitutes the criteria for an audit need

not be specified in the rule. Since the rule sets requirements on the licensee, not on NRC, specifying NRC overview is not necessary.

Several commenters wanted clarification as to the conditions under which access authorizations and audits could be shared. Further clarification was requested as to whether utilities were required to separately review the actual screening information, or if they could rely on the audit process and assurance of the contractor's or vendor's program. Licensees may rely on the contractor or vendor if they choose. However, each licensee is ultimately responsible to the NRC for the audits by any other utility or any contractor programs that they accept. Further clarification was requested as to whether audits of contractor and vendor access authorization programs should be conducted for contractors or vendors who are not active within the annual audit period. If a contractor is not active during the audit period, the contractor or vendor does not need to be audited.

One commenter expressed concern that the audit criteria required only that certain procedures be performed, not that they be performed well. Specifying that audits be done well is redundant. Properly performed audits will be assured by the performance objectives.

Many commenters pointed out the need to have Attachment A of the Guidelines conform to 10 CFR 73.57 which does not permit contractors and vendors to request criminal checks from the FBI through the NRC. Because only utility licensees can request criminal history checks, this is a necessary change which has been made in the Guidelines, Revision 89–01, August 1989.

III.7 Access Authorization During Cold Shutdown

The Guidelines provide for relaxation of the unescorted access authorization requirements during times such as refueling or maintenance outages. The rationale for allowing access requirements to be relaxed is that there is little if any risk of sabotage when the facility is in cold shutdown and appropriate security for fuel is maintained. The Guidelines requirements for "thorough visual inspection" prior to start-up and "appropriate procedures" to assure proper functioning of systems are intended to provide assurance that the functional capability of vital equipment was not impaired during the period. Comments were made that the potential for compromised trustworthiness, reliability, and emotional stability exists as much or more during cold shutdown as during a fully operational state. The Commission agrees with these comments and, therefore, includes specific provisions for cold shutdown in the rule. The Commission further notes that 10 CFR part 73.57(b)(2)(iv), which waives Criminal History Checks during cold shutdown, is not in accord with this conclusion. Therefore, based upon the public comments and fact that the Commission is now promulgating a comprehensive access authorization rule which includes specific provisions for cold shutdown, the Commission is deleting 10 CFR part 73.57(b)(2)(iv). The Commission is taking this action to be sure that the regulations for Criminal History Checks in 10 CFR part 73.57 are consistent with the specific provisions for cold shutdown in the new rule.

The Guidelines do not provide definitive guidance on specific actions required to insure proper functioning of such equipment in the protected and vital areas for which the access authorization requirement has been relaxed. The Commission believes that it is not practical to provide generically more definitive guidance than that of the Guidelines. Rather, the determination as to what measures are needed to ensure that the functional capability of vital equipment has not been impaired by relaxation of the access authorization requirement is specific to the particular plant and the vital equipment affected. These measures (e.g., functional testing of security and reactor systems and components, security searches, enhanced access controls into areas retained as vital, establishment of alternative access requirements) would likely be extensive and could vary dramatically depending on a number of factors including number of workers involved, extent of devitalization, and length and nature of the plant outage. The licensee would also be expected to demonstrate that adequate measures will continue to be in place to protect new and spent fuel that is onsite. Nonetheless, the Commission believes it is possible to evaluate the adequacy of a licensee's site-specific compensatory measures. Therefore, the provision included in the rule allows conditional relaxation of unescorted access during could shutdown on a case-by-case basis. The provision requires the licensee who chooses to implement such relaxation to develop and incorporate into their Physical Security Plans such compensatory measures.

It is the Commission's view that there may be special circumstances where the use of relaxed access requirements and compensatory measures will be a preferable approach. Under most circumstances, the existing options of the access authorization program provide sufficient flexibility for site access. The Commission expects that the option to relax access requirements during cold shutdown will only be exercised during major outages where there is substantial work requiring extensive use of temporary workers. Under these circumstances the licensee would likely have to do extensive functional testing of equipment following the outage for both operational and security purposes.

III.8 Records and Protection of Information

Clarification as to how long records need to be retained was requested. The Commission is requiring a record retention period of 5 years beyond termination of employment or denial of access.

One commenter pointed out that the documentation of the criminal history check is maintained by the licensee and that this should be specifically stated in the Guidelines. The Commission notes this is already stated in 10 CFR 73.57, and it has been added to the Guidelines.

Concerns about protection of information required by this program were expressed, even though it was addressed in the Guidelines. Protection of information is explicitly required by the rule and the situations under which information can be released are specified.

IV. General

IV.1 Relationship to Fitness for Duty

The labor union commenters expressed concerns about the random drug testing program. These comments supported the behavioral observation program because it included observation for substance abuse and, implicitly, drug testing for cause as opposed to random drug testing which the union did not support. The Commission notes drug testing is not part of the access authorization rule. The requirements for drug testing are contained in 10 CFR Part 26, Fitness for Duty Programs. The common element in the two programs is the behavioral observation program. There are no conflicting requirements.

IV.2 Standardization of Requirements

The commenters stressed the importance of standards being consistent throughout the industry. One contractor stated that meeting the standards in the Guidelines should be sufficient for unescorted access to any utility. The Commission intends to establish minimum criteria for a licensee's program for allowing unescorted access to a nuclear power plant in the rule and to endorse the

NUMARC Guidelines (with exceptions as noted in the regulatory guide) as an acceptable means of implementing the rule. The ultimate responsibility for granting unescorted access rests with the licensee, provided the Commission's requirements are met.

IV.3 Failure to Include the Bargaining Unit

The labor unions who commented expressed concern that the Guidelines were developed without input from the bargaining unit or any worker representatives. The unions believed that issues involved in granting access authorization were conditions of employment and as such should be subject to the collective bargaining process. Having the policy statement published in proposed form allowed them and other interested parties to comment and make their opinions known. It is not the intent of the Commission to exclude from consideration or to require consideration of access authorization issues in the collective bargaining process as long as the resolution of these issues is within the limits set by this rulemaking.

IV.4 Responsibility for Revisions to the Guidelines

Many commenters made the point that the Guidelines are NUMARC's and the responsibility for revision remains with NUMARC. This is true. The regulatory guide will endorse only a specific version of the Guidelines, namely Revision 89–01, August 1989. Any changes NUMARC might subsequently make in the Guidelines would not be a part of the regulatory guide. This would not, however, preclude future changes to the regulatory guide or the licensees' commitment to such changes if they do not decrease the effectiveness of the physical security plan under the provisions of 10 CFR 50.54(p).

Environmental Impact: Categorical Exclusion

The NRC has determined that this rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(3). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements will become effective only after they have been approved by the Office of Management and Budget. Notification of OMB approval will be published in the **Federal Register**.

Because all licensees presently have an access authorization program in their Physical Security Plans, the actual public reporting burden for this collection of information is estimated to average a one time burden of 404 hours per response the first year and an annual incremental burden of 161 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Information and Records Management Branch (MNBB–7714), U.S. Nuclear Regulatory Commission, Washington, DC 20555; and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB–3019, (3150–0002), Office of Management and Budget, Washington, DC 20503.

Regulatory Analysis

The Commission has prepared a regulatory analysis on this final regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The analysis is available for inspection in the NRC Public Document Room, 2120 L St. NW. (Lower Level), Washington, DC 20037. Single copies of the analysis may be obtained from Dr. Sandra Frattali, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 492–3773.

Regulatory Flexibility Act Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. This new 10 CFR part 73.56 applies to owners and operators of civilian nuclear power reactors and their contractors and vendors. The companies that own power reactor facilities do not fall within the scope of "small entities" set forth in the Regulatory Flexibility Act or the small business size standards set out in regulations issued by the Small Business Administration in 13 CFR part 121. Any costs to the minor number of small entities affected, i.e., contractors and vendors, will apply only to those employees working at the nuclear power reactors, and presumably would be reimbursed through the contract.

Backfit Analysis

As required by 10 CFR 50.109, the Commission has completed a backfit analysis for the final rule. Based on the analysis, the Commission recognizes that it cannot quantify the reduction in risk and accompanying increase in safety that would result from compliance with the requirements of this rule. However, to the extent that the access authorization program provided for in the rule results in a more effective and thorough screening of persons having unescorted access to nuclear power plants, it will reduce the likelihood of internal acts leading to radiological sabotage and, in any case, will provide increased assurance of trustworthiness and reliability of such individuals. The present rulemaking and associated regulatory guide will specifically provide increased assurance that individuals granted unescorted access to protected and vital areas are trustworthy and reliable and do not pose a threat to commit radiological sabotage by:

1. Establishing minimum requirements for access authorization programs in an enforceable manner.

2. Ensuring that licensees not committed to minimum requirements improve their programs.

3. Providing assurance that those portions of voluntary and improved programs developed and implemented in anticipation of regulatory actions which are consistent with the rule are not degraded for the lifetime of the plant.

These programs have been demonstrated to be cost effective in that many licensees have voluntarily adopted them. Therefore, on balance, the Commission has concluded that the rule will provide a substantial increase in protection to the public health and safety by reducing the risk of radiological sabotage that could be caused by an unreliable or untrustworthy insider at a cost that is justified by enhanced protection.

The backfit analysis on which this determination is based is available for inspection and copying for a fee at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC 20037. Single copies of the analysis may be obtained from Dr. Sandra Frattali, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 492–3773.

List of Subjects in 10 CFR Part 73

Criminal Penalty, Hazardous materials—transportation, Incorporation by reference, Nuclear materials, Nuclear power plants and reactors, Reporting

and recordkeeping requirements, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 73.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

1. The authority citation for part 73 is revised to read as follows:

Authority: Secs. 53, 161, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245 (42 U.S.C. 5841, 5844).

Section 73.1 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99–399, 100 Stat. 876 (42 U.S.C. 2169).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 73.21, 73.37(g), and 73.55 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 73.20, 73.24, 73.25, 73.26, 73.27, 73.37, 73.40, 73.45, 73.46, 73.50, 73.55, and 73.67 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 73.20(c)(1), 73.24(b)(1), 73.26(b)(3), (h)(6), and (k)(4), 73.27 (a) and (b), 73.37(f), 73.40 (b) and (d), 73.46 (g)(6) and (h)(2), 73.50(g)(2), (3)(iii)(B), and (h), 73.55(h)(2) and (4)(iii)(B), 73.57, 73.70, 73.71, and 73.72 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. A new § 73.56 is added to read as follows:

§ 73.56 Personnel access authorization requirements for nuclear power plants.

(a) *General.* (1) Each licensee who is authorized on April 25, 1991, to operate a nuclear power reactor pursuant to §§ 50.21(b) or 50.22 of this chapter shall comply with the requirements of this section. By April 27, 1992, the required access authorization program must be incorporated into the site Physical Security Plan as provided for by 10 CFR 50.54(p)(2) and implemented. By April 27, 1992, each licensee shall certify to the NRC that it has implemented an access authorization program that meets the requirements of this part.

(2) Each applicant for a license to operate a nuclear power reactor pursuant to §§ 50.21(b) or 50.22 of this chapter, whose application was submitted prior to April 25, 1991, shall either by April 27, 1992, or the date of receipt of the operating license, which is later, incorporate the required access authorization program into the site Physical Security Plan and implement it.

(3) Each applicant for a license to operate a nuclear power reactor pursuant to §§ 50.21(b) or 50.22 of this chapter and each applicant for a combined construction permit and operating license pursuant to part 52 of this chapter, whose application is submitted after April 25, 1991, shall include the required access authorization program as part of its Physical Security Plan. The applicant, upon receipt of an operating license or upon receipt of operating authorization, shall implement the required access authorization program as part of its site Physical Security Plan.

(4) The licensee may accept an access authorization program used by its contractors or vendors for their employees provided it meets the requirements of this section. The licensee may accept part of an access authorization program used by its contractors, vendors, or other affected organizations and substitute, supplement, or duplicate any portion of the program as necessary to meet the requirements of this section. In any case, the licensee is responsible for granting, denying, or revoking unescorted access authorization to any contractor, vendor, or other affected organization employee.

(b) *General performance objective and requirements.* (1) The licensee shall establish and maintain an access authorization program granting individuals unescorted access to protected and vital areas with the objective of providing high assurance that individuals granted unescorted access are trustworthy and reliable, and do not constitute an unreasonable risk to the health and safety of the public including a potential to commit radiological sabotage.

(2) Except as provided for in paragraphs (c) and (d) of this section, the unescorted access authorization program must include the following:

(i) A background investigation designed to identify past actions which are indicative of an individual's future reliability within a protected or vital area of a nuclear power reactor. As a minimum, the background investigation must verify an individual's true identity, and develop information concerning an individual's employment history, education history, credit history, criminal history, military service, and verify an individual's character and reputation.

(ii) A psychological assessment designed to evaluate the possible impact of any noted psychological characteristics which may have a bearing on trustworthiness and reliability.

(iii) Behavioral observation, conducted by supervisors and management personnel, designed to detect individual behavioral changes which, if left unattended, could lead to acts detrimental to the public health and safety.

(3) The licensee shall base its decision to grant, deny, revoke, or continue an unescorted access authorization on review and evaluation of all pertinent information developed.

(4) Failure by an individual to report any previous suspension, revocation, or denial of unescorted access to nuclear power reactors is considered sufficient cause for denial of unescorted access authorization.

(c) *Existing, reinstated, transferred, and temporary access authorization.* (1) Individuals who have had an uninterrupted unescorted access authorization for at least 180 days on April 25, 1991 need not be further evaluated. Such individuals shall be subject to the behavioral observation requirements of this section.

(2) The access authorization program may specify conditions for reinstating an interrupted access authorization, for transferring an access authorization from another licensee, and for permitting temporary unescorted access authorization.

(3) The licensee shall grant unescorted access authorization to all individuals who have been certified by the Nuclear Regulatory Commission as suitable for such access.

(d) *Requirements during cold shutdown.* (1) The licensee may grant unescorted access during cold shutdown to an individual who does not possess an access authorization granted in accordance with paragraph (b) of this section provided the licensee develops and incorporates into its Physical Security Plan measures to be taken to ensure that the functional capability of equipment in areas for which the access authorization requirement has been relaxed has not been impaired by relaxation of that requirement.

(2) Prior to incorporating such measures into its Physical Security Plan the licensee shall submit those plan changes to the NRC for review and approval pursuant to § 50.90.

(3) Any provisions in licensees' security plans that allow for relaxation of access authorization requirements during cold shutdown are superseded by this rule. Provisions in licensees' Physical Security Plans on April 25, 1991 that provide for devitalization (that is, a change from vital to protected area status) during cold shutdown are not affected.

(e) *Review procedures.* Each licensee implementing an unescorted access authorization program under the provisions of this section shall include a procedure for the review, at the request of the affected employee, of a denial or revocation by the licensee of unescorted access authorization of an employee of the licensee, contractor, or vendor, which adversely affects employment. The procedure must provide that the employee is informed of the grounds for denial or revocation and allow the employee an opportunity to provide additional relevant information, and provide an opportunity for an objective review of the information on which the denial or revocation was based. The procedure may be an impartial and independent internal management review. Unescorted access may not be granted to the individual during the review process.

(f) *Protection of information.* (1) Each licensee, contractor, or vendor who collects personal information on an employee for the purpose of complying with this section shall establish and maintain a system of files and procedures for the protection of the personal information.

(2) Licensees, contractors, and vendors small make available such personal information to another licensee, contractor, or vendor provided that the request is accompanied by a signed release from the individual.

(3) Licensees, contractors, and vendors may not disclose the personal information collected and maintained to persons other than:

(i) Other licensees, contractors, or vendors, or their authorized representatives, legitimately seeking the information as required by this section for unescorted access decisions and who have obtained a signed release from the individual.

(ii) NRC representatives;

(iii) Appropriate law enforcement officials under court order;

(iv) The subject individual or his or her representative;

(v) Those licensee representatives who have a need to have access to the information in performing assigned duties, including audits of licensee's, contractor's, and vendor's programs;

(vi) Persons deciding matters on review or appeal; or

(vii) Other persons pursuant to court order. This section does not authorize the licensee, contractor, or vendor to withhold evidence of criminal conduct from law enforcement officials.

(g) *Audits.* (1) Each licensee shall audit its access authorization program within 12 months of the effective date of implementation of this program and at least every 24 months thereafter to ensure that the requirements of this section are satisfied.

(2) Each licensee who accepts the access authorization program of a contractor or vendor as provided for by paragraph (a)(4) of this section shall have access to records and shall audit contractor or vendor programs every 12 months to ensure that the requirements of this section are satisfied. Licensees may accept audits of contractors and vendors conducted by other licensees. Each sharing utility shall maintain a copy of the audit report, to include findings, recommendations and corrective actions. Each licensee retains responsibility for the effectiveness of any contractor and vendor program it accepts and the implementation of appropriate corrective action.

(h) *Records.* (1) Each licensee who issues an individual unescorted access authorization shall retain the records on which the authorization is based for the duration of the unescorted access authorization and for a five-year period following its termination. Each licensee who denies an individual unescorted access shall retain the records on which the denial is based for 5 years.

(2) Each licensee shall retain records of results of audits, resolution of the audit findings and corrective actions for three years.

§ 73.57 [Amended]

3. Section 73.57 is amended by removing paragraph (b)(2)(iv) and redesignating paragraph (b)(2)(v) as (b)(2)(iv).

* * * * *

Dated at Rockville, Maryland, this 16th day of April 1991.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Acting Secretary of the Commission.

[FR Doc. 91-9479 Filed 4-24-91; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21 and 25

[Docket No. NM-51; Special Conditions No. 25-ANM-41]

Special Conditions: Modified Avions Marcel Dassault-Breguet Aviation (AMD-BA) Model Falcon 50 Series Airplanes; High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued to Falcon Jet Corporation for modification of the Avions Marcel Dassault-Breguet Aviation (AMD-BA) Falcon 50 series airplanes. These airplanes are equipped with high-technology digital avionics systems that perform critical functions. The applicable regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These special conditions contain the additional safety standards which the Administrator considers necessary to ensure that the critical functions that these systems perform are maintained when the airplane is exposed to HIRF.

DATES: April 17, 1991. Comments must be received on or before May 28, 1991.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, Attn: Rules Docket (ANM-7), Docket No. NM-51, 1601 Lind Avenue SW., Renton, Washington, 98055-4056; or delivered in duplicate to the Office of the Assistant Chief Counsel at the above address. Comments must be marked: Docket No. NM-51. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Greg Holt, FAA, Standardization Branch, ANM-113, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98055-4046; telephone (202) 227-2140.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that good cause exists for making these special conditions effective upon issuance; however, interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or special conditions number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of comments received. All comments submitted will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report

summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this request must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. NM-51." The postcard will be date/time stamped, and returned to the commenter.

Background

On October 19, 1990, Falcon Jet Corporation of Little Rock, Arkansas, submitted a letter of intent to modify the AMD-BA Falcon 50 series airplanes. The modification incorporates a novel or unusual design feature in the form of digital avionics consisting of dual Inertial Reference Systems (IRS) that will be used as the primary attitude source. The IRS is vulnerable to high-intensity radiated fields (HIRF) external to the airplane.

The Falcon 50 is a 12 to 19 passenger, transport category airplane powered by three Garrett TPE731-3-1C turbojet engines, with a maximum takeoff weight of 38,800 to 40,780 lbs.

Supplemental Type Certification Basis

Under the provisions of § 21.115, subpart C, of the FAR, Falcon Jet Corporation must show that the modified AMD-BA Falcon 50 meets the regulations incorporated by reference in Type Certificate No. A46EU, as specified in § 21.101(a), unless: (1) Otherwise specified by the Administrator; (2) compliance with later effective amendments is elected or required under § 21.101 (a) or (b); or (3) special conditions are prescribed by the Administrator.

Based on the provisions of §§ 21.101 (a) and (b), Falcon Jet Corporation will have to show compliance with the basic type certification basis per Type Certificate Data Sheet (TCDS) No. A46EU. The type certification basis for the Falcon 50 is part 25 of the FAR as amended by Amendment 25-34; § 25.255, as amended by Amendment 25-42; §§ 25.979 (d) and (e), as amended by Amendment 25-38; § 25.1013(b)(1), as amended by Amendment 25-36; § 25.1351(d), as amended by Amendment 25-41; § 25.1353(c)(6), as amended by Amendment 25-42; Special Conditions No. 25-86-EU-24, dated March 6, 1979; part 36 as amended by Amendment 36-9; and SFAR 27 as amended by Amendment 36-3 (fuel venting).

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25 requirements) do not contain adequate or appropriate safety standards for the modified Falcon 50 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29(b), and become part of the type certification basis in accordance with § 21.101.

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from high-intensity radiated fields (HIRF). Increased power levels from ground based radio transmitters and the growing use of sensitive electrical and electronic systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, special conditions are needed for the modified Falcon 50 series airplanes which require that new technology electrical and electronic systems, such as the IRS, be designed and installed to preclude component damage and interruption of function due to HIRF.

High-Intensity Radiated Fields

With the trend toward increased power levels from ground based transmitters, plus the advent of space and satellite communications, coupled with electronic command and control of the airplane, the immunity of critical digital avionics systems, such as the IRS, to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraphs 1 or 2 below:

1. A minimum threat of 100 volts per meter peak electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the following field strengths for the frequency ranges indicated.

Frequency	Peak (V/M)	Average (V/M)
10 KHz-500 KHz	80	80
500 KHz-2 MHz	80	80
2 MHz-30 MHz	200	200
30 MHz-100 MHz	33	33
100 MHz-200 MHz	33	33
200 MHz-400 MHz	150	33
400 MHz-1 GHz	8,300	2,000
1 GHz-2 GHz	9,000	1,500
2 GHz-4 GHz	17,000	1,200
4 GHz-6 GHz	14,500	800
6 GHz-8 GHz	4,000	666
8 GHz-12 GHz	9,000	2,000
12 GHz-20 GHz	4,000	509
20 GHz-40 GHz	4,000	1,000

The envelope given in paragraph 2 above is a revision to the envelope used in previously issued special conditions in other certifications projects. It is based on new data and SAE AE4R subcommittee recommendations. This revised envelope includes data from Western Europe and the U.S. It will also be adopted by the European Joint Airworthiness Authorities.

The substance of the special conditions for this airplane has been subjected to the notice and public comment procedure in several prior instances, and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions immediately. Therefore, these special conditions are being made effective upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

Conclusion

This action affects only certain unusual or novel design features on one model series of airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Parts 21 and 25

Air transportation, Aircraft, Aviation safety, Safety.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2), 42 U.S.C. 1857f-10, 4321 et seq.; E.O. 11514; and 49 U.S.C. 106(g).

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for the modified Falcon 50 series airplanes:

1. *Protection from Unwanted Effects of High-Intensity Radiated Fields (HIRF).* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to externally radiated electromagnetic energy.

2. The following definition applies with respect to these special conditions:

Critical Function. Functions whose failure could contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington, on April 17, 1991.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 91-9759 Filed 4-24-91; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Parts 21 and 25

[Docket No. NM-54; Special Conditions No. 25-ANM-42]

Special Conditions: Modified Canadair Limited Model CL-600-1A11 Airplane; High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued to Duncan Aviation, Inc. for modification of the Canadair Limited Model CL-600-1A11 airplane. This airplane is equipped with a high-technology digital avionics system that performs critical functions. The applicable regulations do not contain adequate or appropriate safety standards for the protection of this system from the effects of high-intensity radiated fields (HIRF). These special conditions contain the additional safety standards which the Administrator considers necessary to ensure that the critical functions that this system performs are maintained when the airplane is exposed to HIRF.

DATES: April 17, 1991. Comments must be received on or before May 28, 1991.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, Attn: Rules Docket (ANM-7), Docket No. NM-54, 1601 Lind Avenue SW, Renton, Washington, 98055-4056; or delivered in duplicate to the Office of the Assistant Chief Counsel at the above address. Comments must be marked: Docket No. NM-54. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Mark Quam, FAA, Standardization Branch, ANM-113, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW, Renton, Washington, 98055-4056; telephone (206) 227-2145.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that good cause exists for making these special conditions effective upon issuance; however, interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or special conditions number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of comments received. All comments submitted will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this request must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. NM-54." The postcard will be date/time stamped, and returned to the commenter.

Background

On January 2, 1991, Duncan Aviation Inc., of Lincoln, Nebraska, applied for a supplementary type certificate to modify the Canadair Limited Model CL-600-1A11 airplane. The proposed modification incorporates a novel or unusual design feature in the form of digital avionics consisting of dual electronic flight instrument systems (EFIS) that are vulnerable to high-intensity radiated fields (HIRF) external to the airplane.

The CL-600-1A11 is a two-crew, 19 passenger, low wing, twin turbofan, transport airplane with a maximum takeoff weight of 36,000 pounds.

Supplemental Type Certification Basis

Under the provisions of § 21.115, subpart C, of the FAR, Duncan Aviation, Inc. must show that the modified CL-600-1A11 airplane meets the regulations incorporated by reference in Type Certificate No. A21EA, as specified in § 21.101(a), unless: (1) Otherwise specified by the Administrator; (2) compliance with later effective amendments is elected or required under § 21.101 (a) or (b); or (3) special conditions are prescribed by the Administrator.

The regulations incorporated by reference in Type Certificate Data Sheet A21EA for the Canadair Limited Model CL-600-1A11 are: Part 25 of the FAR, as amended through Amendment 25-37; §§ 25.675(a), 25.685(a), 25.733(c), 25.775(e), 25.787(c), 25.815, 25.841(b), 25.951(a), 25.979 (d) and (e), 25.1041, 25.1143(e), 25.1303(a), 25.1322, 25.1385(c), 25.1557(b), and 25.1583, as amended by Amendment 25-38; §§ 25.901 (b) and (c), 25.903 (c) and (e), 25.933(a), 25.943, 25.959, 25.1091 (a) and (d), 25.1145(c), 25.1199 (b) and (c), 25.1207, 25.1549, and 25.1585(a)(9), as amended by Amendment 25-40; § 25.1309, as amended by Amendment 25-41; § 25.1353(c), as amended by Amendment 25-42; §§ 25.571 and 25.629(d)(4)(v), as amended by Amendment 25-45; §§ 25.351 and 25.603, as amended by Amendment 25-46; part 36 of the FAR, as amended through Amendment 36-9; SFAR 27, as amended through Amendment 27-2; Special Conditions No. 25-94-EA dated March 26, 1980 and Amendment 1 thereto dated September 11, 1981.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25 requirements) do not contain adequate or appropriate safety standards for the modified CL-600-1A11 because of a novel or unusual design feature, special conditions are

prescribed under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29(b), and become part of the type certification basis in accordance with § 21.101.

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from ground based radio transmitters and the growing use of sensitive electrical and electronic systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, special conditions are required for the modified CL–600–1A11 airplane that require that new technology electrical and electronic systems, such as the EFIS, be designed and installed to preclude component damage and interruption of function due to HIRF.

High-Intensity Radiated Fields

With the trend toward increased power levels from ground based transmitters, plus the advent of space and satellite communications, coupled with electronic command and control of the airplane, the immunity of critical digital avionics systems, such as the EFIS, to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraphs 1 or 2 below:

1. A minimum threat of 100 volts per meter peak electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the following field strengths for the frequency ranges indicated.

Frequency	Peak (V/M)	Average (V/M)
10 KHz–500 KHz	80	80
500 KHz–2 MHz	80	80
2 MHz–30 MHz	200	200
30 MHz–100 MHz	33	33
100 MHz–200 MHz	33	33
200 MHz–400 MHz	150	33
400 MHz–1 GHz	8,300	2,000
1 GHz–2 GHz	9,000	1,500
2 GHz–4 GHz	17,000	1,200
4 GHz–6 GHz	14,500	800
6 GHz–8 GHz	4,000	666
8 GHz–12 GHz	9,000	2,000
12 GHz–20 GHz	4,000	509
20 GHz–40 GHz	4,000	1,000

The envelope given in paragraph 2 above is a revision to the envelope used in previously issued special conditions in other certification projects. It is based on new data and SAE AE4R subcommittee recommendations. This revised envelope includes data from Western Europe and the U.S. It will also be adopted by the European Joint Airworthiness Authorities.

The substance of the special conditions for this airplane has been subjected to the notice and public comment procedure in several prior instances, and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions immediately. Therefore, these special conditions are being made effective upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

Conclusion

This action affects only certain unusual or novel design features on one model series of airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Parts 21 and 25

Air transportation, Aircraft, Aviation safety, Safety.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2), 42 U.S.C. 1857f–10, 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g).

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for the modified Canadair Limited Model CL–600–1A11 airplane:

1. *Protection from Unwanted Effects of High-Intensity Radiated Fields (HIRF).* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to externally radiated electromagnetic energy.

2. The following definition applies with respect to these special conditions:

Critical Function. Functions whose failure could contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington, on April 17, 1991.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 91–9758 Filed 4–24–91; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Parts 21 and 25

[Docket No. NM–56; Special Condition No. 25–ANM–44]

Special Conditions; Modified Cessna Model 500, 550 and S550 Airplanes: High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Cessna Model 500, 550 and S550 airplanes modified by ElectroSonics Division of AiRadio Corporation in Columbus, Ohio. These airplanes are equipped with high-technology digital avionics systems which perform critical functions. The applicable regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These

special conditions provide the additional safety standards which the Administrator considers necessary to ensure that the critical functions performed by this system are maintained when these airplanes are exposed to HIRF.

DATES: The effective date of these special conditions is April 17, 1991. Comments must be received on or before June 10, 1991.

ADDRESSES: Comments may be mailed in duplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, attn: Rules Docket (ANM-7), Docket No. NM-56, 1601 Lind Avenue SW., Renton, Washington, 98055-4056; or delivered in duplicate to the Office of the Assistant Chief Counsel at the above address. Comments must be marked; Docket No. NM-56. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Mark Quam, FAA, Standardization Branch, ANM-113, Transport Standards Staff, Transport Airplane Directorate, Aircraft Certification Service, Renton, Washington 98055-4056, telephone: (206) 227-2145.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that good cause exists for making these special conditions effective upon issuance; however, interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket and special conditions number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. These special conditions may be changed in light of the comments received. All comments submitted will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this request must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. NM-56." The postcard will be date/time stamped, and returned to the commentor.

Background

On January 14, 1991, ElectroSonics Division of AiRadio Corporation, applied for a Supplemental Type Certificate to modify the Cessna Model 500, 550 and S550 airplanes. The proposed modification incorporates a number of novel or unusual design features, such as digital avionics consisting of a dual electronic flight instrument system (EFIS) which is vulnerable to high-intensity radiated fields (HIRF) external to the airplane.

Supplemental Type Certification Basis

Under the provisions of § 21.115, subpart C of the FAR, ElectroSonics Division of AiRadio Corporation must show that the altered Cessna Model 500, 550 and S550 airplanes meet the applicable requirements as specified in § 21.101 (a) and (b); unless (1) Otherwise specified by the Administrator; or (2) Compliance with later effective amendments is elected or required under § 21.101 (a) and (b); or (3) Special conditions are prescribed by the Administrator.

The requirements specified in § 21.101(a) are the regulations incorporated by reference in Type Certificate No. A22CE as follows:

Model 500: Part 25 of the Federal Aviation Regulations effective February 1, 1965, as amended by Amendments 25-1 through 25-17; except §§ 25.934 and 25.1091(d)(2) as amended through Amendment 25-23; § 25.1387 as amended through Amendment 25-30; §§ 25.1385 and 25.1303(a)(2) as amended through Amendment 25-38; plus Special Conditions 25-25-CE-4; part 36 of the Federal Aviation Regulations effective December 1, 1969.

Model 550: Part 25 of the Federal Aviation Regulations effective February 1, 1965, as amended by Amendments 25-1 through 25-17; except §§ 25.934 and 25.1091(d)(2) as amended through Amendment 25-23; § 25.1401 as amended through Amendment 25-27; § 25-1387 as amended through Amendment 25-30; §§ 25.1303(a)(2) and 25.1385(c) as amended through Amendment 25-38; plus Special Conditions 25-25-CE-4; part 36 of the Federal Aviation Regulations effective December 1, 1969; SFAR 27, as amended by Amendments 27-1 and 27-2, fuel venting.

Model S550: Part 25 of the Federal Aviation Regulations effective February 1, 1965, as amended by Amendments 25-1 through 25-17; except §§ 25.251(e), 25.934 and 25.1091(d)(2) as amended through Amendment 25-23; § 25.1401 as amended through Amendment 25-27; § 25.1387 as amended through Amendment 25-30; §§ 25-787, 25.789, 25.791, 25.853, 25.855, 25.857, and 25.1359 as amended through Amendment 25-32; §§ 25-1303(a)(2) and 25.1385(c) as amended through Amendment 25-38; plus Special Conditions 25-25-CE-4; part 36 of the Federal Aviation Regulations effective December 1, 1969, as amended by 36-1 through 36-12; SFAR 27, as amended by Amendments 27-1 and 27-2, fuel venting.

For Electronic Flight Instrument Systems only, the following apply: §§ 25.1301, 25.1303(b), and 25.1322 as amended through Amendment 25-38; §§ 25.1309, 25.1321 (a), (b), (d), and (e), 25.1331, 25.1333, and 25.1335 as amended through Amendment 25-41. These special conditions are an additional part of the type certification basis.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25 requirements) do not contain adequate or appropriate safety standards for the modified Cessna Model 500, 550 and S550 airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.101(b)(2) to establish a level of safety equivalent to that established by the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29, and become part of the type certification basis in accordance with § 21.115(a).

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from high-intensity radiated fields (HIRF). Increased power levels from ground based radio transmitters and the growing use of sensitive electrical and electronic systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, these special conditions require that the new technology electrical and electronic systems, such as the Electronic Flight Instrument System (EFIS) be designed and installed to preclude component damage and interruption of function due to HIRF.

High-Intensity Radiated Fields (HIRF)

With the trend toward increased power levels from ground based transmitters, plus the advent of space and satellite communication, coupled with electronic command and control of

the airplane, the immunity of critical digital avionics systems, such as EFIS to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with HIRF protection special conditions is shown with either paragraphs 1 or 2 below:

1. A minimum threat of 100 volts per meter peak electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the following field strengths for the frequency ranges indicated.

Frequency	Peak (V/M)	Average (V/M)
10 KHz–500 KHz	80	80
500 KHz–2 MHz	80	80
2 MHz–30 MHz	200	200
30 MHz–100 MHz	33	33
100 MHz–200 MHz	33	33
200 MHz–400 MHz	150	33
400 MHz–1 GHz	8,300	2,000
1 GHz–2 GHz	9,000	1,500
2 GHz–4 GHz	17,000	1,200
4 GHz–6 GHz	14,500	800
6 GHz–8 GHz	4,000	666
8 GHz–12 GHz	9,000	2,000
12 GHz–20 GHz	4,000	509
20 GHz–40 GHz	4,000	1,000

The envelope given in paragraph 2 above is a revision to the envelope used in previously issued special conditions in other certification projects. It is based on new data and SAE AE4R subcommittee recommendations. This revised envelope includes data from Western Europe and the U.S. It will also be adopted by the European Joint Airworthiness Authorities.

Conclusion

This action affects only certain unusual or novel design features on one model of airplane. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA for approval of these features on the airplane.

The substance of the special conditions for this airplane has been subjected to the notice and comment procedure in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions immediately. Therefore, these special conditions are being made effective upon issuance. The FAA is requesting comments to allow interested persons to submit views that may have not been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Parts 21 and 25

Air transportation, Aircraft, Aviation safety, Safety.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2), 42 U.S.C. 1857f–10, 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

The Final Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for the modified Cessna Model 500, 550 and S550 airplanes:

1. Protection from Unwanted Effects of High-Intensity Radiated Fields (HIRF). Each electrical and electronic system which performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to externally radiated electromagnetic energy.

2. The following definition applies with respect to this special condition: Critical Function. Function whose failure would contribute to or cause a failure condition which would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington, on April 17, 1991.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 91–9760 Filed 4–24–91; 8:45 a.m.]

BILLING CODE 4910–13–M

14 CFR Parts 21 and 25

[Docket No. NM–55; Special Conditions No. 25–ANM–43]

Special Conditions: Modified Learjet Model 55 Airplane: High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions, request for comments.

SUMMARY: These special conditions are issued for the Learjet Model 55 airplane modified by Duncan Aviation, Inc., in Lincoln, Nebraska. This airplane is equipped with high-technology digital avionics systems which perform critical functions. The applicable regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These special conditions provide the additional safety standards which the Administrator considers necessary to ensure that the critical functions performed by this system are maintained when the airplane is exposed to HIRF.

DATES: The effective date of these special conditions is April 17, 1991. Comments must be received on or before June 10, 1991.

ADDRESSES: Comments may be mailed in duplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, attn: Rules Docket (ANM–7), Docket No. NM–55, 1601 Lind Avenue SW., Renton, Washington, 98055–4056; or delivered in duplicate to the Office of the Assistant Chief Counsel at the above address. Comments must be marked; Docket No. NM–55. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Mark Quam, FAA, Standardization Branch, ANM–113, Transport Standards Staff, Transport Airplane Directorate Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98055–4056, telephone: (206) 227–2145.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that good cause exists for making these special conditions effective upon issuance; however, interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket and special conditions

number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. These special conditions may be changed in light of the comments received. All comments submitted will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this request must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. NM-55." The postcard will be date/time stamped, and returned to the commentor.

Background

On December 6, 1990, Duncan Aviation Inc., applied for a Supplemental Type Certificate to modify the Learjet Model 55 airplane. The proposed modification incorporates a number of novel or unusual design features, such as digital avionics consisting of a dual electronic flight instrument system (EFIS) which is vulnerable to high-intensity radiated fields (HIRF) external to the airplane.

Supplemental Type Certification Basis

Under the provisions of § 21.115, subpart C of the FAR, Duncan Aviation Inc., must show that the altered Learjet Model 55 airplane meets the applicable requirements as specified in § 21.101 (a) and (b); unless (1) Otherwise specified by the Administrator; or (2) Compliance with later effective amendments is elected or required under § 21.101 (a) and (b); and (3) Special conditions are prescribed by the Administrator.

The requirements specified in § 21.101(a) are the regulations incorporated by reference in Type Certificate No. A10CE for the Learjet Model 55 airplanes. Those are: Part 25 effective February 1, 1965, as amended by Amendments 25-2 and 25-4. In addition: Amendments 25-3, 25-7, 25-10, 25-12, 25-18, 25-21, and 25-30, plus § 25.955(b)(2) of Amendment 25-11; § 25.954 of Amendment 25-14; §§ 25.803(e), 25.811(f), 25-853(a), 25.853(b), and 25-855(a) of Amendment 25-15; § 25.1359 of Amendment 25-17; § 25.785(c) of Amendment 25-20; §§ 25.251(c), 25.251(d), 25.251(e), 25.303, 25.305(b), 25.307(d), 25.331(a)(3), 25.335(b), 25.335(f), 25.337(b), 25.349(b), 25.351(a), 25.363, 25.395(a), 25.395(b), 25.471(a)(1), 25.471(a)(2), 25.473, 25.493(b), 25.499(b), 25.499(c), 25.499(d), 25.509(a)(3), 25.561(b)(3), 25.581, 25.607, 25.615, 25.619, 25.625, 25.629, 26.677, 25.697, 25.699, 25.701, 25.721, 25.723, 25.725, 25.727, 25.729, 25.733, 25.735, 25.865, 25.867, 25.871, 25.903(d), 25.934, 25.994, 25.1103(d), 25.1143(e), 25.1303, 25.1307, 25.1331, and 25.1585(c) of Amendment 25-23; §§ 25.1013(e), 25.1305(c)(4), and 25.1305(c)(6) of Amendment 25-36; §§ 25.815, 25.1322, and 25.1403 of Amendment 25-38; and §§ 25.903(e), 25.939, and 25.943 of Amendment 25-40; § 25.255 of Amendment 25-42; § 25.1326 of Amendment 25-43; part 36 effective December 1, 1969, as amended through Amendment 36-10 when modified according to ECR 1513; Special Federal Aviation Regulation (SFAR) 27 effective February 1, 1974, as amended through Amendment SFAR 27-2; and Special Conditions 25-99-CE-14; Special Conditions 25-ANM-2 dated June 24, 1983, when configured per ECR 2377A or modified per AAK 55-83-4. Compliance with structural provisions of § 25.801 (b) through (e) and 25.807(d) has not been shown.

Ice Protection: § 25.1419, when ice protection system is installed per ECR 1906. These adopted special conditions are an additional part of the type certification basis.

If the Administrator finds that the applicable airworthiness regulations (i.e., Part 25 requirements) do not contain adequate or appropriate safety standards for the modified Learjet Model 55 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.101(b)(2) to establish a level of safety equivalent to that established by the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29, and become part of the type certification basis in accordance with § 21.115(a).

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from high-intensity radiated fields (HIRF). Increased power levels from ground based radio transmitters and the growing use of sensitive electrical and electronic systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, these special conditions require that the new technology electrical and electronic systems, such as the Electronic Flight Instrument System (EFIS), be designed and installed to preclude component damage and interruption of function due to HIRF.

High-Intensity Radiated Fields (HIRF)

With the trend toward increased power levels from ground based transmitters, plus the advent of space and satellite communication, coupled with electronic command and control of the airplane, the immunity of critical digital avionics systems, such as EFIS, to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with HIRF protection special conditions is shown with either paragraphs 1 or 2 below:

1. A minimum threat of 100 volts per meter peak electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the following field strengths for the frequency ranges indicated.

Frequency	Peak (V/M)	Average (V/M)
10 KHz-500 KHz	80	80
500 KHz-2 MHz	80	80
2 MHz-30 MHz	200	200
30 MHz-100 MHz	33	33
100 MHz-200 MHz	33	33
200 MHz-400MHz	150	33
400 MHz-1 GHz	8,300	2,000
1 GHz-2 GHz	9,000	1,500
2 GHz-4 GHz	17,000	1,200
4 GHz-6 GHz	14,500	800
6 GHz-8 GHz	4,000	666
8 GHz-12 GHz	9,000	2,000
12 GHz-20 GHz	4,000	509
20 GHz-40 GHz	4,000	1,000

The envelope given in paragraph 2 above is a revision to the envelope used in previously issued special conditions in other certification projects. It is based on new data and SAE AE4R subcommittee recommendations. This revised envelope includes data from Western Europe and the U.S. It will also

be adopted by the European Joint Airworthiness Authorities.

Conclusion

This action affects only certain unusual or novel design features on one model of airplane. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA for approval of these features on the airplane.

The substance of the special conditions for this airplane has been subjected to the notice and comment procedure in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions immediately. Therefore, these special conditions are being made effective upon issuance. The FAA is requesting comments to allow interested persons to submit views that may have not been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Parts 21 and 25

Air transportation, Aircraft, Aviation safety, Safety.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2), 42 U.S.C. 1857f-10, 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

The Final Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for the modified Learjet Model 55 airplane:

1. Protection from unwanted effects of High-Intensity Radiated Fields (HIRF). Each electrical and electronic system which performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to externally radiated electromagnetic energy.

2. The following definition applies with respect to this special condition:

Critical Function. Function whose failure would contribute to or cause a failure condition which would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington, on April 17, 1991.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 91-9761 Filed 4-24-91; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 770, 775, 779, 785, and 799

[Docket No. 910372-1072]

Exports to Poland, Hungary, and Czechoslovakia; Exports and Reexports of National Security Controlled Commodities and Related Technical Data

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Export Administration is amending the Export Administration Regulations (EAR) (15 CFR parts 730-799) to revise certain licensing policies and procedures for Poland, Hungary, and Czechoslovakia. This action is taken in consultation with the Departments of State and Defense and in agreement with the Coordinating Committee for Multilateral Export Controls (COCOM). This final rule implements a policy of favorable consideration for license applications to export certain commodities and technical data to Poland, Hungary, or Czechoslovakia. The items eligible for this favorable consideration treatment include all "A" level commodities and related technical data that are not specifically excluded by the *"Not Eligible for Favorable Consideration to Country Group W"* paragraphs located in applicable Commodity Control List (CCL) entries or by similar notations in part 779 of the EAR.

This rule also amends the EAR to include new requirements based on the implementation of Import Certificate/Delivery Verification (IC/DV) procedures by Poland, Hungary, and Czechoslovakia.

In addition, this rule amends the EAR to include Poland, Hungary, and Czechoslovakia in Country Group W. Formerly, Poland and Hungary were in Country Group W and Czechoslovakia was in Country Group Y.

This rule also makes certain corrections to eligibility for General License GCT.

These changes will reduce processing times for applications to export certain "A" level items to Poland, Hungary, and Czechoslovakia.

DATES: *Effective date:* This rule is effective April 25, 1991. *Compliance:* The 45 day grace period provided in 15 CFR 775.10(b)(2) (as newly designated), will apply to the requirement to submit the Polish, Hungarian, or Czechoslovak Import Certificate with an export license application. During the grace period, applications will be accepted when accompanied by either a Form BXA-629P (Statement by Ultimate Consignee and Purchaser) or a Polish, Hungarian, or Czechoslovak Import Certificate, but applications accompanied by such certificates can be expedited.

FOR FURTHER INFORMATION CONTACT: Diana Marvin, Office of Technology and Policy Analysis, Bureau of Export Administration, telephone: (202) 377-3160.

SUPPLEMENTARY INFORMATION:

Background

Recent political changes in Eastern Europe have led the United States and members of the Coordinating Committee on Multilateral Export Controls (COCOM) to review the multilateral export controls on strategic items that apply to these countries. In February 1990, the COCOM Executive Committee decided to examine a policy of differentiating among East European countries for export control purposes. A decision was reached, at the COCOM High Level Meeting in June 1990, to develop special procedures for exports to those countries that constitute a lesser strategic threat and that have adopted appropriate safeguard systems to protect controlled items against diversion.

During the period since June 1990, COCOM considered the safeguard systems of Poland, Hungary, and Czechoslovakia, and agreed that these countries are eligible for special procedures.

This final rule implements the special COCOM procedures for reviewing license applications for exports to Poland, Hungary, or Czechoslovakia. License applications to export most commodities controlled on the COCOM Industrial List (IL) and related technical data, to Poland, Hungary, or Czechoslovakia will now receive favorable consideration, when accompanied by an appropriate Import Certificate. The IL controlled

commodities in the CCL are those that are listed under ECCNs beginning with the number "1" and ending in the code letter "A". The only "A" level IL commodities that are not eligible for this favorable consideration review are those described in the *Not Eligible for Favorable Consideration to Country Group W* paragraphs located in the following ECCNs on the CCL: 1091A, 1355A, 1357A, 1361A, 1388A, 1417A, 1418A, 1485A, 1501A, 1510A, 1519A, 1522A, 1527A, 1565A, 1585A, and 1763A.

The only COCOM controlled technical data not eligible for favorable consideration is the data described in § 779.4(d)(17) of the EAR and data required for the design, development, or use of commodities excluded from the favorable consideration procedures.

The favorable consideration policy for Poland, Hungary, and Czechoslovakia means that an application for eligible items will be subject to a four-week COCOM review period with a presumption of approval unless specific objections are raised to the proposed transaction. Items not eligible for favorable consideration will continue to be reviewed in accordance with the general exceptions policy described in § 785.2(a) of the EAR, which includes an eight-week COCOM review period and no presumption of approval. Items covered by Advisory Notes indicating a likelihood of approval to satisfactory end-users in Country Group W will continue to be reviewed under national discretion procedures.

Poland, Hungary, and Czechoslovakia have implemented safeguard procedures to protect controlled items from diversion to other countries or to unauthorized end-users/end-uses. These new procedures became effective for Poland on October 1, 1990, for Hungary on October 3, 1990, and for Czechoslovakia on February 1, 1991. The government of each country has:

(1) Made a national commitment to protect controlled items against diversion;

(2) Implemented Import Certificate/Delivery Verification procedures; and

(3) Made provisions for on-site pre-license and post-shipment checks.

This final rule also amends the EAR to add requirements reflecting the implementation of Import Certificate/Delivery Verification procedures by Poland, Hungary, and Czechoslovakia. A license application or reexport request that contains national security controlled commodities (ECCNs ending in the code letter "A") and COCOM controlled technical data destined for Poland, Hungary, or Czechoslovakia must be accompanied by an original Import Certificate (IC), covering these items, issued by the Polish Ministry of Foreign Economic Relations, the Hungarian Ministry of International Economic Relations, or the Czechoslovak Ministry of Foreign Trade, respectively. The Import Certificate contains safeguards on the transfer of the item and establishes the basis for pre-license checks and post shipment verifications. The Bureau of Export Administration will be implementing an extensive program of pre-license checks and post-shipment verifications in these countries. The government of each country has committed to cooperate with this effort.

Delivery Verification Certificates (DV) will be required on a selective basis, in accordance with § 775.3(i) of the EAR. Issuance of a DV by the government of the importing country constitutes an acknowledgment by that government that the exported items have either entered the export jurisdiction of the importing country or are otherwise accounted for by the importer.

Clarification of CFR: The current footnote 1 to § 775.3(b), which appears in the January 1, 1990, edition of 15 CFR part 300–799, correctly reflected the text of footnote 1 that the Bureau of Export Administration intended in its rule published May 16, 1989 (55 FR 21050). The footnote is being set out in its entirety in this document, at the request of the Office of the Federal Register, to clarify any ambiguity that may have resulted in the amendatory instructions in the original May 16, 1989, rule.

Rulemaking Requirements

1. This rule is consistent with Executive Orders 12291 and 12661.

2. This rule involves collections of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). These collections have been approved by the Office of Management and Budget under control numbers 0694–0001, 0694–0005, 0694–0016, 0694–0021, and 0694–0047. There will be an increase in export license applications (0694–0005) and a slight increase in requests for exceptions to the IC/DV Procedures (0694–0001).

The Import Certificate requirements set forth in the new § 775.8 of the EAR, supersedes the requirements for Form BXA–629P, Statement by Ultimate Consignee and Purchaser (approved by the Office of Budget and Management under control number 0694–0021) to accompany license applications for exports and reexports to Poland, Hungary or Czechoslovakia. The Import Certificate issued by the Governments of these countries required in § 775.9 of the EAR does not constitute a collection of information under the Paperwork Reduction Act of 1989. As a result of this rule, there will be a decrease of Statements by Ultimate Consignee and Purchaser and there will be an increase in the number of Delivery Verification Certificates, Form BXA–647P, approved by OMB under control number 0694–0016.

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553) or by any other law, under sections 603(a) and 604(a) no initial or final Regulatory Flexibility Analysis has to be or will be prepared.

5. The provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a foreign and military affairs function of the United States. The rule does not impose a new control. No other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Accordingly, it is being issued in final form. However, comments from the public are always welcome. Comments should be submitted to Patricia Muldonian, Office of Technology and Policy Analysis, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, DC 20044.

List of Subjects

15 CFR Part 770

Administration practice and procedure, Exports.

15 CFR Parts 775 and 799

Exports, Reporting and recordkeeping requirements.

15 CFR Part 785

Communist Countries, Exports.

15 CFR Part 779

Computer technology, Exports, Reporting and recordkeeping requirements, Science and technology.

Accordingly, parts 770, 775, 785, 779, and 799, of the Export Administration Regulations are amended as follows:

1. The authority citations for 15 CFR parts 770 and 775 are revised to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended; Pub. L. 95–223, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*); Executive Order No. 12730 of September 30, 1990 (55 FR 40373, October 2, 1990).

2. The authority citations for 15 CFR parts 785, 779 and 799 are revised to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app 2401 *et seq.*, as amended; Pub. L. 95–223, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*); Executive Order No. 12730 of September 30, 1990 (55 FR 40373, October 2, 1990).

PART 770—[AMENDED]

Supplement No. 1 to Part 770

3. Supplement No. 1 to part 770 is amended by adding the reference "Czechoslovakia" immediately before the reference "Hungary" as listed under Country Group W and by removing the reference "Czechoslovakia" as listed under Country Group Y.

PART 775—[AMENDED]

4. The table in § 775.1(b) is amended by revising the column headings, by redesignating entry number 7 as entry number 8 and by adding a new entry number 7 to read as follows:

§ 775.1 Introduction.

* * * * *

(b) * * *

If the commodity[1] is:	And the country of destination is:	Required document is:	For specific regulations see:
* * *	* * *	* * *	
7. Identified by the code letter A following the Export Control Commodity Number.	Czechoslovakia Hungary, or Poland	Import Certificate issued by the government of the country of destination..	775.8
* * *	* * *	* * *	

[1] The Import Certificate requirement for Czechoslovakia, Hungary, or Poland applies to technical data as well as commodities.

* * * * *

5. The phrase "Form ITA–629" is revised to read "Form BXA 629P" in the following places:

In the table in § 775.1(b), newly designated entry no. 8 in the column titled "Required document is".

Sections
775.2(b)(2)
775.2(e)(2)
775.2(e)(6) [3 references]

§§ 775.1 and 775.2 [Amended]

§§ 775.1, 775.2, 775.3, and 775.9 [Amended]

6. The phrase "Form DIB–629P" is revised to read "Form BXA–629P" in the following places:

In the table in § 775.1(b), entry no. 2 in the column titled "Required document is".

Sections
775.2(b), the note following paragraph (b)(9)
775.2(d)(1) [3 references]
775.2(d)(2)
775.2(d)(3)
775.2(e) introductory text
775.2(e)(2) [2 references]
775.2(e)(3)
775.2(e)(4)
775.2(e)(5) heading and text [6 references]
775.2(e)[7] introductory text
775.2(g) [2 references]
775.2(h) heading and text [3 references]
775.2(i) [2 references]
775.2(j) heading
775.2(j)(1)
775.2(j)(2)
775.2(j)(3)
775.3(f) heading
775.3(f)(1)
775.3(f)(2)
775.9(a)

§ 775.6 [Amended]

8. In § 775.6(c), the heading and text are amended by revising the phrase "Form ITA–629P" to read "Form BXA–629P".

§ 775.2 [Amended]

9. In § 775.2(e)(3), the phrase "Part 374" is revised to read "Part 774".

10. Section 775.2 is amended by revising paragraph (b)(1) to read as follows:

§ 775.2 Form BXA–629P, statement by ultimate consignee and purchaser.

* * * * *

(b) * * *

(1) An International Import Certificate (§ 775.3), a Swiss Blue Import Certificate (§ 775.4), a Yugoslav End Use Certificate (§ 775.5), a People's Republic of China End-User Certificate (§ 775.6), an Indian Import Certificate (§ 775.7), or Polish, Hungarian, or Czechoslovak Import Certificate (§ 775.8) is required in support of the application.

* * * * *

11. Section 775.3(b), the heading and first sentence are republished and footnote number 1 is revised to read as follows:

§ 775.3 International import certificate and delivery verification certificate.

* * * * *

(b) *Destinations.* The following country destinations are subject to the International Import Certificate/Delivery Verification Certificate requirements.[1]

* * * * *

§ 775.3 [Amended]

12. Section 775.3(e) is amended by revising the reference "775.9(g)" to read "775.10(g)" in the concluding text.

13. Section 775.3(f)(3) is amended by revising the reference "775.9(b)" to read "775.10(b)" in the parenthetical phrase at the end of the paragraph.

§ 775.4 [Amended]

14. Section 775.4(c) is amended by revising the reference "775.9(g)" to read "775.10(g)" in the concluding text.

§ 775.5 [Amended]

15. Section 775.5(c) is amended by revising the reference "775.9(g)" to read "775.10(g)".

§§ 775.9 and 775.10 [Redesignated from §§ 775.8 and 775.9]

16. Part 775 is amended by redesignating §§ 775.8 and 775.9 as §§ 775.9 and 775.10, respectively and by adding a new § 775.8 to read as follows:

§ 775.8 Polish, Hungarian, or Czechoslovak import certificates.

(a) *Requirements.* License applications to export or reexport commodities identified by the code letter "A" on the Commodity Control List or COCOM controlled technical

[1] See § 775.4 for Swiss Blue Import Certificate requirements, § 775.5 for Yugoslav End-Use Certificate requirements, § 775.6 for People's Republic of China End-User Certificate requirements, § 775.7 for Indian Import Certificate requirements, and § 775.8 for Polish, Hungarian, or Czechoslovak Import Certificate requirements.

data to Poland, Hungary, or Czechoslovakia must be accompanied by the original Import Certificate issued to the importer by the Polish Ministry of Foreign Economic Relations, Hungarian Ministry of International Economic Relations or the Czechoslovak Ministry of Foreign Trade, respectively. These ministries certify that all items described in the Import Certificate are for use only as authorized and will not be reexported to a third country without prior authorization.

(b) *Exemptions*—(1) *Shipments with a total value of less than $5,000.* An Import Certificate need not be submitted to support a license application to export commodities classified in a single entry on the Commodity Control List, the total value of which, as shown on the export order, is less the $5,000. In limited circumstances the Office of Export Licensing may request an Import Certificate for an order valued under $5,000. In such event, the exporter will be so notified specifically by the Office of Export Licensing. An Import Certificate is required for technical data regardless of value.

(2) *Temporary export.* An Import Certificate need not be submitted to support a license application to export commodities for temporary exhibition, demonstration, or testing purposes in Poland, Hungary, or Czechoslovakia (see § 772.8(c) of this subchapter).

(c) *Exceptions.* The Office of Export Licensing, with the concurrence of the Office of Export Enforcement, may grant an exception to the Import Certificate requirement where an exporter demonstrates extraordinary circumstances justifying the absence of the document and where the exception will not be contrary to the objectives of the U.S. export control program. The procedure to follow in requesting an exception is set forth in § 775.10(g).

(d) *Delivery verifications.* The Office of Export Licensing will, on a selective basis, require Delivery Verification documents for shipments to Poland, Hungary, and Czechoslovakia that are subject to the Import Certificate procedure. The exporter will usually be notified of the Delivery Verification requirement at the time of issuance of the export license. (See § 775.3(i) for background information on the Delivery Verification procedure.)

§ 775.10 [Amended]

17. In the newly designated § 775.10, the introductory text and paragraph (a) are amended by revising the phrase "Certificates and Indian Import Certificates" to read "Certificates, Indian Import Certificates, and Polish, Hungarian, or Czechoslovak Import Certificates".

18. In the newly designated § 775.10, the heading and introductory text of paragraph (b)(2) are revised to read as follows:

§ 775.10 Special provisions.

* * * * *

(b) * * *

(2) *International Import Certificate, Indian Import Certificate, and the Polish, Hungarian, or Czechoslovak Import Certificate.* Whenever the requirement for an International Import Certificate, Indian Import Certificate, or a Polish, Hungarian, or Czechoslovak Import Certificate for any commodity is imposed or extended by virtue of one of the following—

* * * * *

§ 775.10 [Amended]

19. In the newly designated § 775.10, paragraphs (c), (e), (f)(1), (f)(2), and (g)(1) are amended by revising the phrase "or Indian Import Certificate," to read "Indian Import Certificate, or Polish, Hungarian, or Czechoslovak Import Certificate".

20. Supplement No. 1 to part 775 is amended by adding the entries for "Czechoslovakia", "Hungary", and "Poland" in alphabetical order to read as follows:

SUPPLEMENT NO. 1—AUTHORITIES ADMINISTERING IMPORT CERTIFICATE/DELIVERY VERIFICATION SYSTEM IN FOREIGN COUNTRIES [1]

[See footnotes at end of table]

Country	IC/DV authorities	System administered [2]
*	*	*
Czechoslovakia	Federal Ministry of Foreign Trade, Head of Licensing, Politickych Veznu 20, 112 49 Praha 1	IC/DV
*	*	*
Hungary	Ministry of International Economic Relations, Export Control Office, 1054 Budapest P.O. Box 728, H-1365, Hold Str. 17	IC/DV
*	*	*
Poland	Ministry of Foreign Economic Relations, Department of Commodities and Services, Plac Trzech Krzyzy 5, Room 358, 00-507 Warsaw.	IC/DV
*	*	*

[1] Facsimiles of Import Certificate and Delivery Verifications issued by each of these countries may be inspected at the Bureau of Export Administration Western Regional Office, 330 Irvine Avenue, suite 345, Newport Beach, California 92660-3198 or at any U.S. Department of Commerce District Office (see listing on page ii under Commerce Office Addresses) or at the Office of Export Licensing, room 1099D, U.S. Department of Commerce, 14th Street and Pennsylvania, NW., Washington, DC 20230. Copies are not available.

[2] IC—Import Certificate and/or DV—Delivery Verification.

PART 785—[AMENDED]

21. Section 785.2 is amended by removing the parenthetical phrase "(other than the U.S.S.R. and Poland)" in the last sentence of paragraph (a)(1) and by adding a new paragraph (c) to read as follows:

§ 785.2 Country Group Q, W, and Y [1]; U.S.S.R., Other Warsaw Pact Countries, Albania, Mongolian People's Republic, and Laos.

* * * * *

(c) *Country Group W: Favorable consideration policy.* The countries of Poland, Hungary, and Czechoslovakia (Country Group W) have been determined to present a lesser strategic threat, and have adopted safeguard measures to protect against the diversion of COCOM controlled commodities and technical data. In recognition of these facts, and consistent with COCOM agreement, the Department will review, under favorable consideration procedures, applications to export or reexport to Poland, Hungary, or Czechoslovakia any U.S.-origin commodity that is controlled under an Export Control Commodity Number (ECCN) on the Commodity Control List (supplement No. 1 to § 799.1 of this subchapter) beginning with the number "1" and ending in the code letter "A", *unless* the item is described in a *Not Eligible for Favorable Consideration to Country Group W* paragraph contained in the applicable

[1] See supplement No. 1 to part 770 of this subchapter for listing of Country Groups.

ECCN. Commodities not eligible for favorable consideration will be reviewed in accordance with the general exceptions policy described in paragraph (a) of this section. Commodities covered by Advisory Notes indicating a likelihood of approval to satisfactory end-users in Country Group W will continue to be reviewed under national discretion procedures. The Department will also review, under favorable consideration procedures, all technical data and software destined to Poland, Hungary, and Czechoslovakia, except technical data described in § 779.4(d)(17) of this subchapter, and software and technical data required for the design, development, production, or use of commodities excluded from these favorable consideration procedures.

PART 779—[AMENDED]

22. Section 779.4 is amended by revising the introductory text of paragraph (d)(17) to read as follows:

§ 779.4 General license GTDR: Technical data under restriction.

* * * * *

(d) * * *

(17) *(Not Eligible for Favorable Consideration to Country Group W.)* Technical data for application to non-electrical devices to achieve:

* * * * *

23. Section 779.5(a) is amended by revising paragraphs (a)(1) and (a)(2) and by adding a new paragraph (a)(3) to read as follows:

§ 779.5 Validated license applications.

(a) *General.* * * *

(1) Form BXA–622P, Application for Export License, accompanied by;

(2) A letter of explanation described in § 779.5(d); and

(3) For shipments to Poland, Hungary, and Czechoslovakia, an Import Certificate issued by the appropriate national government. (See § 775.8 and supplement No. 1 to part 775 of this subchapter.)

* * * * *

PART 799—[AMENDED]

Supplement 1 to § 799.1 [Amended]

24. Supplement No. 1 to § 799.1 (the Commodity Control List) is amended by adding a new paragraph "*Not Eligible for Favorable Consideration to Country Group W:* Entire entry." immediately following the "*Commodities Not Eligible for General License GCT*" paragraph for each of the following entries:

A. In Commodity Group 3, General Industrial Equipment: ECCN: 1388A; and

B. In Commodity Group 4, Transportation Equipment: ECCN 1418A.

25. Supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 0 (Metal-Working Machinery) ECCN 1091A is amended by adding a new paragraph "*Not Eligible for Favorable Consideration to Country Group W:* Entire entry." immediately following the "*GLV $ Value Limit*" paragraph.

26. Supplement No. 1 to § 799.1 (the Commodity Control List) is amended by removing the *"Commodities Not Eligible for General License GCT"* or *"Commodities Not Eligible for General Licenses GCT or GDR"* paragraph in the following entries.

A. In Commodity Group 3, General Industrial Equipment: ECCN 4302B; and

B. In Commodity Group 5, Electronic and Precision Instruments: ECCNs: 4518B and 4587B.

27. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 3 (General Industrial Equipment) ECCN 1355A is amended by revising the *"Commodities Not Eligible for General License GCT"* paragraph and by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1355A Equipment for the manufacture or testing of electronic components and materials; and specially designed components, accessories and "specially designed software" therefor.

Controls for ECCN 1355A

* * * * *

Commodities Not Eligible for General License GCT: Metal-organic chemical vapor deposition reactors; molecular beam epitaxial growth equipment; electron beam systems capable of mask-making or semiconductor device processing; photo-optical step and repeat equipment; and electron beam, ion beam, or X-ray equipment for projection image transfer controlled by paragraphs (b)(1)(iv)(C), (b)(1)(v), (b)(1)(x), (b)(2)(vi), and (b)(2)(vii) of this ECCN respectively.

Not Eligible for Favorable Consideration to Country Group W: Metal-organic chemical vapor deposition reactors; molecular beam epitaxial growth equipment; electron beam systems capable of mask-making or semiconductor device processing; photo-optical step and repeat equipment; and electron beam, ion beam, or X-ray equipment for projection image transfer controlled by paragraphs (b)(1)(iv)(C), (b)(1)(v), (b)(1)(x), (b)(2)(vi), and (b)(2)(vii) of this ECCN respectively, and "specially designed software" therefor.

* * * * *

28. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 3 (General Industrial Equipment) ECCN 1357A is amended by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1357A Equipment for the production of fibers controlled by export for ECCN 1763A or their composites, and specially designed components and accessories and "specially designed software" therefor.

* * * * *

Controls for ECCN 1357A

* * * * *

Commodities Not Eligible for General License GCT: * * *

Not Eligible for Favorable Consideration to Country Group W: Filament winding machines and tape-laying machines controlled by paragraphs (a) and (b) of this ECCN respectively, and "Specially designed software" therefor.

* * * * *

29. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 3 (General Industrial Equipment) ECCN 1361A is amended by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1361A Test facilities and equipment for the design or development of aircraft or gas turbine aero-engines; and specially designed components, and accessories therefor.

* * * * *

Controls for ECCN 1361A

* * * * *

Commodities Not Eligible for General License GCT: * * *

Not Eligible for Favorable Consideration to Country Group W: Equipment controlled by paragraph (a), (b), (c), (d), (f), or (g) of this ECCN.

* * * * *

30. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 4 (Transportation Equipment) ECCN 1417A is amended by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General*

License GCT" paragraph to read as follows:

1417A Submersible systems (including those incorporated in a submersible vehicle) and specially designed components therefor.

* * * * *

Controls for ECCN 1417A

* * * * *

Commodities Not Eligible for General License GCT: * * *

Not Eligible for Favorable Consideration to Country Group W: Environmental control systems, navigation systems, and remotely controlled articulated manipulators controlled by paragraphs (a), (b), and (d) or this ECCN, respectively.

* * * * *

31. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 4 (Transportation Equipment) ECCN 1460A is amended by revising the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1460A Aircraft and helicopters, including tilt wing and tilt rotor aircraft, aero-engines and aircraft and helicopter equipment.

* * * * *

Controls for ECCN 1460A

* * * * *

Commodities Not Eligible for General License GCT: Helicopter power transfer systems, small fuel efficient gas turbine aero engines, and specially designed components therefor controlled by paragarphs (b), (c), and (d), of this ECCN, respectively. Small fuel efficient gas turbine aero engines are those, uncertified or certified, with 2,000 pounds thrust or less (un-installed) and having a thrust specific fuel consumption (TSFC) for maximum power at sea level static, standard day, equal to or less than 0.45 lb./lb./hr.

* * * * *

32. In supplement No. 1 to § 799.1 (the Commodity Control List), Commodity Group 4 (Transportation Equipment), ECCN 1485A is amended by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1485A Inertial navigation systems, inertial equipment, gyroscopes (gyros) and accelerometers, as follows, and specially designed components thereof.

* * * * *

Controls for ECCN 1485A

* * * * *

Commodities Not Eligible for General License GCT: * * *

Not Eligible for Favorable Consideration to Country Group W: Equipment controlled under paragraphs (b), (c) and (d) of this ECCN.

* * * * *

33. In supplement No. 1 to § 799.1 (the Commodity Control List), Commodity Group 5 (Electronics and Precision Instruments), ECCN 1501A is amended by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1501A Navigation, direction finding, radar and airborne communication equipment.

* * * * *

Controls for ECCN 1501A

* * * * *

Commodities Not Eligible for General License GCT: * * *

Not Eligible for Favorable Consideration to Country Group W: Navigation and direction finding equipment and radar equipment controlled under paragraphs (b)(2) through (b)(5) and paragraph (c) of this ECCN usable for launch and ground support equipment, including precision tracking systems usable for complete rocket systems and unmanned air vehicle systems described in section 776.18 of this subchapter.

* * * * *

34. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 5 (Electronics and Precision Instruments) ECCN 1510A is amended by revising the ECCN heading and adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1510A Marine or terrestrial acoustic systems or equipment specially designed for detecting or locating underwater or subterranean objects or features or for determining the position of surface or underwater vehicles and specially designed components therefor.

* * * * *

Controls for ECCN 1510A

* * * * *

Commodities Not Eligible for General License GCT: * * *

Not Eligible for Favorable Consideration to Country Group W: Entire entry, except acoustic systems or equipment described in the (Advisory) Note for the People's Republic of China for this ECCN.

* * * * *

35. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 5 (Electronics and Precision Instruments) ECCN 1519A is amended by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"GLV $ Value Limit"* paragraph to read as follows:

1519A "Telecommunication transmission equipment", measuring and test equipment, as follows, and specially designed components and accessories therefor.

* * * * *

Controls for ECCN 1519A

* * * * *

GLV $ Value Limit: * * *

Not Eligible for Favorable Consideration to Country Group W: Entire entry, except "telecommunication equipment" described in (Advisory) Note 6, (Advisory) Note 7, and (Advisory) Note 8 for this ECCN.

* * * * *

36. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 5 (Electronics and Precision Instruments) ECCN 1522A is amended by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"GLV $ Value Limit"* paragraph to read as follows:

1522A "Lasers", and specially designed components and accessories therefor including amplification stages.

* * * * *

Controls for ECCN 1522A

* * * * *

GLV $ Value Limit: * * *

Not Eligible for Favorable Consideration to Country Group W: "Lasers" exceeding the parameters of (Advisory) Note 3 for the People's Republic of China for this ECCN.

* * * * *

37. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 5 (Electronics and Precision Instruments) ECCN 1527A is amended by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1527A Cryptographic equipment and specially designed components therefor, designed to ensure secrecy of communications (such as telegraphy, telephony facsimile, video and data communications) or of stored information; and "software" controlling or computers performing the functions of such cryptographic equipment.

Controls for ECCN 1527A

* * * * *

Commodities Not Eligible for General License GCT: * * *

Not Eligible for Favorable Consideration to Country Group W: Entire entry, except;

(1) Automatic bank teller equipment, defined as devices that provide bank account information, dispense currency, process consumer transactions, or act as point of sale terminals;

(2) Equipment whose only cryptographic function is to authenticate data by calculation of a message authentication code (MAC);

(3) Equipment whose only cryptographic function is to protect passwords or personal identification numbers (PIN) to prevent unauthorized access to computing facilities; and

(4) Television descramblers using analog scrambling techniques for the purpose of entertainment

* * * * *

38. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 5 (Electronics and Precision Instruments) ECCN 1565A is amended by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1565A Electronics computers, "related equipment", equipment or systems containing electronic computers, and technical data therefor; and specially designed components for these electronic computers and "related equipment".

* * * * *

Controls for ECCN 1565A

* * * * *

Commodities Not Eligible for General License GCT: * * *

Not Eligible for Favorable Consideration to Country Group W: Electronic computers and related equipment, as follows:

(1) Supercomputers or digital computers and related equipment controlled by paragraph (h) of this ECCN having a total processing data rate (PDR) exceeding 2,000 million bits per second.

(2) Analog computers, equipment or systems containing analog computers, and digital computers that contain the design features described in paragraphs (a), (b), (f), or (g) of this ECCN.

(3) Analog and hybrid computers controlled by paragraphs (c) and (d), and (h) as applicable to (d) of this ECCN, when combined with specially designed software for modeling, simulation, or design integration of complete rocket systems and unmanned air vehicle systems described in § 776.18(a) of this subchapter.

(4) Digital computers used as ancillary equipment for test facilities and equipment that are controlled by ECCNs 1361A and 1362A for nuclear non-proliferation purposes.

* * * * *

39. In supplement No. 1 to § 779.1 (the Commodity Control List), Commodity Group 5 (Electronics and Precision Instruments), ECCN 1568A is amended by revising the *"Commodities Not Eligible for General Licenses GCT or GDR"* paragraph to read as follows:

1568A Analog-to-digital and digital-to-analog converter equipment, position encoders and transducers, and specially designed components and test equipment therefor

* * * * *

Controls for ECCN 1568A

* * * * *

Commodities Not Eligible for General License GCT: Analog-to digital converters controlled by paragraph (a) or (e) of this ECCN when usable in systems described in § 776.18(a) of this subchapter and having any of the following characteristics: rated for continuous operation at temperatures below −45° C to above 55° C; designed to meet military specifications for ruggedized equipment, or modified for military use; or designed for radiation resistance.

* * * * *

40. In supplement No. 1 to § 799.1 (the Commodity Control List) Commodity Group 5 (Electronics and Precision Instruments) ECCN 1585A is amended by revising the *"Commodities Not Eligible for General License GCT"* paragraph and by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1585A Cameras, components and photographic recording media.

* * * * *

Controls for ECCN 1585A

* * * * *

Commodities Not Eligible for General License GCT: High speed photographic equipment controlled by paragraph (b), (c), (d), or (e) of this ECCN.

Not Eligible for Favorable Consideration to Country Group W: High speed photographic equipment controlled by paragraph (b), (c), (d), or (e) of this ECCN.

* * * * *

41. In supplement No. 1 to § 799.1 (the Commodity Control List), Commodity Group 6 (Metals, Minerals, and their Manufactures) ECCN 3604A is amended by adding a *"Commodities Not Eligible for General License GCT"* paragraph immediately following the *"GLV $ Value Limit"* paragraph to read as follows:

3604A Zirconium metal, alloys and components.

Controls for ECCN 3604A

* * * * *

GLV $ Value Limit: * * *

Commodities Not Eligible for General License GCT: Entire entry.

* * * * *

42. In supplement No. 1 to § 799.1 (the Commodity Control List), Commodity Group 7 (Chemicals, Metalloids, Petroleum Products and Related Materials) ECCN 1763A is amended by revising the ECCN heading and by adding a *"Not Eligible for Favorable Consideration to Country Group W"* paragraph immediately following the *"Commodities Not Eligible for General License GCT"* paragraph to read as follows:

1763A "Fibrous and filamentary materials" that may be used in organic "matrix", metallic "matrix", or carbon "matrix" "composite" structures and laminates and "specially designed software" therefor.

* * * * *

Controls for ECCN 1763A

* * * * *

Commodities Not Eligible for General License GCT: * * *

Not Eligible for Favorable Consideration to Country Group W: "Fibrous and filamentary materials" and resin or pitch-impregnated fibers controlled by paragraphs (a), (b), or (c) of this ECCN and "composite" structures controlled by paragraph (d) of this ECCN when specifically designed for military, stealth or space applications, and "specially designed software" therefor.

* * * * *

Dated: April 17, 1991.

James M. LeMunyon,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 91-9441 Filed 4-24-91; 8:45 am]

BILLING CODE 3510-DT-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510 and 522

Animal Drugs, Feeds, and Related Products; Change of Sponsor

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for three new animal drug applications (NADA's) from Norbrook Laboratories, Ltd., to Akorn, Inc.

EFFECTIVE DATE: April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Puyot, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1414.

SUPPLEMENTARY INFORMATION: Norbrook Laboratories, Ltd., Station Works, Newry BT356JP, Northern Ireland, advised FDA of a change of sponsor of three NADA's to Akorn, Inc., 100 Akorn Dr., Abita Springs, LA 70420. Akorn, Inc., has verified the change of ownership. The NADA's affected are: Dexamethasone Sodium Phosphate Injection, 4 milligrams per milliliter (mg/mL), NADA 110–046; Phenylbutazone Injection, 200 mg/mL, NADA 94–978; and Prednisolone Aqueous Suspension (Injection), 10 or 25 mg/mL, NADA 12–444.

The agency is amending 21 CFR 510.600 (c)(1) and (c)(2) to add Akorn, Inc., to the list of sponsors of approved NADA's. The agency is also amending the regulations in 21 CFR 522.540(d)(2)(ii), 522.1720(b)(1), and 522.1880(b) to reflect the change of sponsor.

List of Subjects in 21 CFR

Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

Part 522

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510 and 522 are amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 512, 701, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 376).

2. Section 510.600 is amended in the table in paragraph (c)(1) by alphabetically adding a new entry "Akorn, Inc." and in the table in paragraph (c)(2) by numerically adding the entry "017478" to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	
Akorn, Inc., 100 Akorn Dr., Abita Springs, LA 70420	017478
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
* * * * *	
017478.....	Akorn, Inc., 100 Akorn Dr., Abita Springs, LA 70420.
* * * * *	

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

3. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

§ 522.540 [Amended]

4. Section 522.540 *Dexamethasone injection* is amended in paragraph (d)(2)(ii) by removing "055529" and replacing it with "017478".

§ 522.1720 [Amended]

5. Section 522.1720 *Phenylbutazone injection* is amended in paragraph (b)(1) by removing "055529" and replacing it with "017478".

§ 522.1880 [Amended]

6. Section 522.1880 *Sterile prednisolone suspension* is amended in paragraph (b) by removing "055529" and replacing it with "017478".

Dated: April 22, 1991.

Robert C. Livingston,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 91–9813 Filed 4–24–91; 8:45 am]

BILLING CODE 4160–01–M

21 CFR Parts 510 and 558

Animal Drugs, Feeds, and Related Products; Tylosin-Sulfamethazine

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) ia amending the animal drug regulations to remove those portions reflecting approval of a new animal drug application (NADA) held by J & R Specialty Supply Co. The NADA provides for the use of a tylosinsulfamethazine Type A medicated article to make a Type C medicated swine feed. In a notice published elsewhere in this issue of the **Federal Register**, FDA is withdrawing approval of the NADA.

EFFECTIVE DATE: May 6, 1991.

FOR FURTHER INFORMATION CONTACT: Mohammad I. Sharar, Center for Veterinary Medicine (HFV–216), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–4093.

SUPPLEMENTARY INFORMATION: In a notice published elsewhere in this issue of the **Federal Register**, FDA is withdrawing approval of NADA 138–454 held by J & R Specialty Supply Co., 310 Second Ave. SW., P.O. Box 506, Waseca, MN 56093. This document amends those portions of the regulations that reflect approval of this NADA.

Additionally, because J & R Specialty Supply Co. no longer sponsors any approved NADA's, § 510.600 (21 CFR 510.600) is amended to remove the sponsor entries for the firm.

List of Subjects in 21 CFR

Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21

CFR parts 510 and 558 are amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 512, 701, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 376).

§ 510.600 [Amended]

2. Section 510.600 *Names, addresses, and drug labeler codes of sponsors of approved applications* is amended in the table in paragraph (c)(1) by removing the entry for "J & R Specialty Supply Co.," and in the table in paragraph (c)(2) by removing the entry for "049768".

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

3. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: Secs. 512, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b, 371).

§ 558.630 [Amended]

4. Section 558.630 *Tylosin and sulfamethazine* is amended in paragraph (b)(10) by removing the number "049768".

Dated: April 18, 1991.

Gerald B. Guest,

Director, Center for Veterinary Medicine.

[FR Doc. 91-9812 Filed 4-24-91; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8345]

RIN 1545-AP49

Arbitrage Restrictions on Tax Exempt Bonds

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the arbitrage rebate requirements applicable to tax exempt bonds issued by States and local governments under section 103 of the Internal Revenue Code. Changes to the applicable law were made by the Tax Reform Act of 1986, the Technical and Miscellaneous Revenue Act of 1988, the Revenue Reconciliation Act of 1989, and the Revenue Reconciliation Act of 1990. The text of the temporary regulations set forth in this document also serves as the text of the notice of proposed regulations cross-referenced in the proposed rules section of this issue of the Federal Register.

DATES: These regulations are effective April 25, 1991. Pursuant to § 1.148-0T(b), as added by T.D. 8252 and as amended in part by these temporary regulations, and § 1.103-13T(b), these temporary regulations are applicable to private activity bonds issued after December 31, 1985, and for bonds other than private activity bonds issued after August 31, 1986, except as provided in § 1.148-0T(b) as amended. Section 1.149-1T(d)(3) applies to bonds issued after May 28, 1991.

FOR FURTHER INFORMATION CONTACT: William P. Cejudo, (202) 566-3283 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends the Income Tax Regulations (26 CFR part 1) promulgated with respect to sections 103, 148, and 149 of the Internal Revenue Code to simplify, clarify, and expand certain provisions of the temporary and proposed regulations §§ 1.148-0T through 1.148-9T and § 1.149(d)-1T published in the Federal Register for May 15, 1989 (54 FR 20787 (1989)).

Explanation of Provisions

A. Reasons for and Purposes of Amendments to the Regulations

Since their release in May 1989, the arbitrage rebate regulations have been the subject of considerable commentary from both tax practitioners and government officials. A public hearing was held on the arbitrage rebate regulations on December 13, 1989. In addition, numerous written comments have been received from tax practitioners and governmental officials. The purpose of these amendments is to address some of the issues that have been raised with respect to the arbitrage rebate regulations and to make certain simplifying changes. It is anticipated that this regulatory project will be the first in a series of projects to amend the arbitrage rebate regulations. It is further anticipated that this series of future high priority regulatory projects on the arbitrage rebate regulations will include projects to address the two-year exception to the arbitrage rebate requirement for construction issues under section 148(f)(4)(C), the transferred proceeds rules for refundings under § 1.148-4T(e), and the general allocation and accounting rules for arbitrage rebate purposes under § 1.148-4T, and including particularly rules for commingled investments. The Internal Revenue Service invites further comments on these high priority projects.

B. Modifications to § 1.148-1T—Required Rebate to the United States

1. Computation of Rebate Installment Amounts (§ 1.148-1T(b)(1)(i)(A))

Existing regulations. A rebate installment payment of 90 percent of computed rebatable arbitrage (determined as of a rebate installment computation date) must be paid to the Federal government. For purposes of this 90 percent installment payment requirement, the existing regulations fail to take proper account of previous rebate installment payments. Thus, with respect to rebate installment computation dates occurring after the first rebate installment computation date, a rebate installment payment of 90 percent of the 10 percent unpaid rebatable arbitrage from the previous installment computation date must be paid.

For example, assume bonds were issued on January 1, 1990. On January 1, 1995 (the first rebate installment computation date), aggregate rebatable arbitrage of $100,000 was computed with respect to the bonds. As of January 1, 1995, a rebate installment payment of $90,000 (90 percent of $100,000) is due the federal government with respect to the first installment period. Assume that no rebatable arbitrage was earned during the period from January 1, 1995, through January 1, 2000, (the second rebate installment computation date). As of January 1, 2000, a rebate installment payment of $9,000 (90 percent of the $10,000 unpaid rebatable arbitrage from the first installment period) is due to the federal government with respect to the second installment period. Assume no rebatable arbitrage was earned during the period from January 1, 2000, through January 1, 2005, (the third rebate installment computation date). As of January 1, 2005, a rebate installment payment of $900 (90 percent of the $1,000 unpaid rebatable arbitrage as of the second rebate installment computation date) is due the federal government with respect to the third installment period. For purposes of this example, actual or deemed earnings on the $10,000 of unpaid rebatable arbitrage due after the first rebate installment computation date are ignored.

Change. One purpose of the 90 percent rebate installment payment requirement is to provide a cushion from installment period to installment period to allow an

issuer to use later period earnings below the bond yield to offset earlier period earlier earnings above the bond yield to reach proper economic results. The 90 percent requirement should operate so that, as of a rebate installment computation date, the issuer will have paid 90 percent of all rebatable arbitrage it has earned since the date of issue of the bonds. In order to accomplish this result, amended § 1.148–1T(b)(1)(i) provides that, as of a rebate installment computation date, an issuer must pay to the federal government an amount that, when added to all previous rebate payments, equals 90 percent of the total rebatable arbitrage due on the issue (computed from the date of issue to the rebate installment computation date).

The effect of this amendment to § 1.148–1T(b)(1)(i) on the previous example is illustrated below. No rebate payment would be due with respect to the rebate amount computed as of the January 1, 2000, or the January 1, 2005, installment computation dates (disregarding actual or deemed earnings on the unpaid rebatable arbitrage). The total rebatable arbitrage computed as of the second installment computation date is $100,000 ($100,000 from the first installment period plus $0 from the second installment period). Ninety percent of $100,000 is $90,000. That amount less $90,000 rebatable arbitrage already paid with respect to the first installment period leaves $0 rebate due as of the second rebate installment computation date (again disregarding actual or deemed earnings on unpaid rebatable arbitrage). Similarly, no rebate would be due as of January 1, 2005, with respect to the third installment period. The $10,000 of remaining rebatable arbitrage, however, would be due 60 days after the bonds matured or were redeemed.

2. Tax Exempt Status of Refunding Issue Dependent on Compliance of Refunded Issue With Rebate Requirements (§ 1.148–1T(b)(1)(ii))

Existing regulations. A refunding issue does not comply with the arbitrage rebate requirement if the refunded issue did not comply with the arbitrage rebate requirement.

Change. In order to simplify compliance with the arbitrage rebate requirement with respect to refunding bonds, this requirement is deleted, however, the refunded issue must still comply with relevant tax requirements.

3. Arbitrage Earnings on Final Payments (§ 1.148–1T(b)(2)(iv))

Existing regulations. As of any rebate computation date (either an installment computation date or a final computation date), an issuer is required to calculate the rebatable arbitrage earned up to and including that date (the "rebate amount"). An issuer is allowed up to 60 days after the rebate computation date to pay the rebate amount calculated as of the rebate computation date. In the case of the final computation date, interest is imputed on the rebate amount for the period beginning on the final computation date and ending on the final rebate payment date (up to 60 days). The rebate amount plus this imputed interest is required to be paid to the federal government.

Change. The administrative complexity of this requirement outweighs the small financial benefit to the federal government of capturing, as rebate, this relatively small amount of investment earnings. Amended § 1.148–1T(b)(2)(iv) provides that imputation of earnings is not required if the final rebate payment is made within the 60-day period beginning on the final computation date. This amendment applies to investment earnings earned during the period beginning on the final computation date and ending on the date of payment of the rebate amount.

C. Modifications to § 1.148–2T—Computation of rebatable Arbitrage

1. Variable Computation Date Credit (§ 1.148–2T(b)(4))

Existing regulations. A credit of $250 for bonds with an issue price of $1 million or less, $625 for bonds with an issue price greater than $1 million but less than $5 million, and $1,000 for bonds with an issue price greater than $5 million is allowed against rebatable arbitrage. No credit is allowed unless at least 75 percent of the net sale proceeds of the bonds have been spent on the project as of the rebate computation date.

Change. In order to simplify this provision, amended § 1.148–2T(b)(4) permits a single $3,000 credit for all bonds in lieu of the three separate credits. In addition, the requirement that at least 75 percent of the net sale proceeds be spent in order for bonds to be entitled to the credit is deleted.

2. Compounding Interval for Investment Yield (§ 1.148–2T(e)(4))

Existing regulations. A number of relatively complex rules determine the compounding period used in computing the yield on investments of gross proceeds. In certain circumstances, these rules may require a compounding interval for investment yield computation purposes different than the compounding interval for bond yield computation purposes.

Change. The purpose of the future value method is to compare yields on different investments using consistent compounding assumptions. The same compounding interval should be used for computing the yield on investments of gross proceeds and the yield on bonds. Amended § 1.148–2T(e)(4) requires that the compounding interval used to compute the yield on an investment be the same as the compounding interval used to compute the yield on the issue. Amended § 1.148–3T(b)(11) changes the rules prescribing the permitted compounding interval for purposes of computing bond yield.

D. Modifications to § 1.148–3T—Computation of Yield on Issue

1. Bond Yield Recalculation for Certain Yield-to-Call Bonds (§ 1.148–3T(b)(4)(i))

Existing regulations. For purposes of computing bond yield, bonds are generally treated as called on a call date occurring prior to maturity if that treatment would result in a lower yield on the bonds (determined as of the date of issue of the bonds). A bond treated as called on a call date prior to its maturity is a yield-to-call bond. If a yield-to-call bond is not actually called on the call date that produces the lowest bond yield (determined as of the date of issue of the bonds), the bond is treated as being retired on that call date for the stated retirement price and then reissued on that date for a price equal to that retirement price.

Change. Under amended § 1.148–3T(c)(4), yield on most fixed yield bonds is calculated only once, as of the date of issue of the bonds. Amended § 1.148–3T(b)(4)(i) provides that yield is not recalculated for a fixed yield bond that is a yield-to-call bond and that meets the requirements of § 1.148–3T(c)(4) even if the bond is not called on the call date assumed for yield-to-call purposes.

2. Exception for Original Issue Premium on Certain Yield-to-Call Bonds (§ 1.148–3T(b)(4)(ii))

Existing regulations. Any fixed yield bond that has a significantly lower yield attributable to an early call is generally treated as a yield-to-call bond.

Change. Amended § 1.148–3T(b)(4)(ii) provides two simplified mechanical exceptions to the definition of a yield-to-call bond. First, a bond that is not subject to redemption prior to maturity is not a yield-to-call bond. Second, a bond that meets each of the following requirements is not a yield-to-call bond: (1) The bond is a fixed yield bond; (2) the stated rate of interest on the bond remains constant during its term; and (3)

the amount of original issue premium on the bond does not exceed .25 percent multiplied by the number of years to the first call date of the bond. This second exception provides safe-harbor relief from the complex yield-to-call rules for fixed yield bonds (with no stepped coupons) with relatively insignificant amounts of original issue premium.

3. Definition of "Right to Retire" Not To Include Unspent Proceeds Calls (§ 1.148–3T(b)(6)(ii)(B))

Existing regulations. The purpose of the "early retirement value" concept is to take into account the effect on bond yield of early retirement of bonds. The early retirement value concept generally applies when bond yield is required to be recomputed and the early retirement value is used to define the cash flows with respect to a bond to be taken into account in computing bond yield. For purposes of computing bond yield, the bond is treated as retired at its early retirement value (i.e., on the first call date that would result in the lowest yield on the bond). For purposes of determining early retirement value, the right to call bonds with unspent bond proceeds (an "excess proceeds call") is treated as a call date that must be taken into account. Under the early retirement concept, in a standard serial bond transaction, an excess proceeds call date may be treated as the maturity date of the bonds producing an artificially low yield on the bonds for arbitrage rebate purposes.

Change. Under amended § 1.148–3T(b)(6)(ii)(B), an excess proceeds call is generally not taken into account for purposes of determining the early retirement value of a bond. Bond yield recalculation is required in the event that significant excess proceeds are used to call bonds. Amended § 1.148–3T(c)(4) requires yield recalculation on fixed yield bonds in the event of certain significant excess proceeds calls.

4. Exception to Special Early Retirement Value Rule for Certain Original Issue Discount Bonds (§ 1.148–3T(b)(7)(iii)(C))

Existing regulations. There is no de minimis exception to the special early retirement value rule applicable to bonds subject to mandatory redemption that covers bonds issued with small amounts of original issue discount. In the case of many bonds with minimal amounts of original issue discount, therefore, complex yield calculations must be made to determine whether the special rule applies.

Change. New § 1.148–3T(b)(7)(iii)(C) provides a simplified mechanical exception under which a relatively small amount of original issue discount on a bond will not cause the bond to be subject to the special early retirement value rule. The rules in § 1.148–3T(b)(7)(iii) (A) and (B) pertaining to discount bonds apply to a bond issued with original issue discount only if: (1) The amount of discount is greater than .25 percent multiplied by the number of complete years to the final maturity date of the bonds; (2) the amount of discount is greater than .125 percent multiplied by the number of complete years to the final maturity date of the bonds and the first mandatory early redemption date of the bonds is more than 15 years before the final maturity date of the bonds; or (3) the amount of bonds subject to mandatory redemption on any date is more than 10 percent greater than the amount of bonds subject to mandatory redemption or payable at maturity on any later date.

5. Special Rules for Certain Early Redemptions in Determining Early Retirement Value (§ 1.148–3T(b)(7))

Existing regulations. The present definition of early retirement value does not permit an issuer to take into account redemption premium actually paid when recalculating bond yield.

Change. New § 1.148–3T(b)(7)(iv) permits issuers to take into account premium actually paid on mandatory or optional redemptions made pursuant to the relevant bond documents and to take into account the accreted value of the bonds for open market purchases of bonds. In the event new § 1.148–3T(b)(7)(iv) applies, the early retirement value of the bond is as follows: (1) The actual redemption price of the bond (including call premium, if any) if the bond is redeemed pursuant to its terms (e.g., bonds called for redemption pursuant to the bond documents); or (2) the sum of the issue price of the bond plus accrued original issue discount determined under section 1288(a) if the bond is not redeemed pursuant to its terms (e.g., an open market purchase such as in a tender offer for the bonds).

The following example illustrates the operation of this provision. Assume that the accreted value of a bond is 80 percent of par (80) but it is redeemed at par (100) pursuant to an optional redemption provision in the documents. The early retirement value is par (100). If the bond were purchased for par on the open market and retired when the accreted value was 80, however, the early retirement value would be 80.

6. Compounding Interval for Bond Yield (§ 1.148–3T(b)(11))

Existing regulations. An issuer is required to use the accrual period described in section 1272 as the compounding interval for determining bond yield. Section 1272(a)(5) defines the accrual period as the 6-month period (or shorter period from date of issue) ending on the day in the calendar year corresponding to the maturity date of the debt instrument or the date 6 months before such maturity date. Some issuers who desire to use the same compounding interval for multiple issues for administrative convenience have found the section 1272 accrual period definition to be inadequate.

Change. In order to provide issuers with maximum flexibility, amended § 1.148–3T(b)(11) permits the issuer to choose any compounding interval of not more than 1 year for purposes of computing yield on and the present value of a bond. Amended § 1.148–2T(e)(4) requires that issuers use the same compounding interval for purposes of determining the yield on investments and the yield on the bonds.

7. Determination of a Reasonable Charge With Respect to a Qualified Guarantee (§ 1.148–3T(b)(12)(iii))

Existing regulations. An issuer may take into account amounts paid for a "qualified guarantee" for purposes of computing yield on the issue. A guarantee is a qualified guarantee only if the present value of the payments for the guarantee is less than the present value of the interest expected to be saved as a result of the guarantee. Under § 1.148–3T(b)(12)(iii), the yield-to-maturity on the "bond" is to be used as the discount rate for purposes of determining the present value of the guarantee payments and the interest savings.

Change. Amended § 1.148–3T(b)(12)(iii) provides that the present value test is to be performed on the basis of the entire issue and the yield-to-maturity to be used for purposes of determining present value savings is the yield on the entire issue. This rule is consistent with the present value test for bond insurance in § 1.103–13(c)(8)(ii).

8. Expansion of the Definition of Qualified Guarantees With Respect to Eligible Purpose Investments (§ 1.148–3T(b)(12)(viii)(B))

Existing regulations. Guarantees on "eligible purpose investments" may be taken into account for purposes of computing yield on the issue. The definition of an eligible purpose investment does not include an investment that has a yield higher than that permitted under § 1.103–13(b)(5)(i)(A) (i.e., .125 percent above bond yield).

Change. Amended § 1.148–3T(b)(12)(viii)(B) provides that investments eligible for a 1.5 percent yield over the bond yield as "acquired program obligations" under § 1.103–13(b)(5)(viii) may also qualify as eligible purpose investments.

9. Special Rule Exempting Fixed Yield Issues From Yield Recalculation Except in Limited Circumstances (§ 1.148–3T(c)(4))

Existing regulations. In the case of all but certain small issuers, an issuer of fixed rate bonds generally must recalculate yield on the bonds after the date of issue of the bonds if an event occurs that would change the bond yield. For example, if an issuer exercises an option to call the bonds prior to maturity, yield on the bonds must be recalculated taking into account the early call. If the issuer calculated bond yield as of the date of issue and restricted investments of the bond proceeds to that yield so as not to earn arbitrage and thereby avoid paying rebate, the recalculated (and most likely lower) bond yield may cause the issuer to pay an unanticipated rebate.

Change. Amended § 1.148–3T(c)(4) changes the general rule of yield calculation for "fixed yield issues" (i.e., fixed rate bonds) from a rule that yield recalculation is always required except in certain limited circumstances to a rule that yield recalculation is generally not required except under certain limited circumstances. Because of the possibility of yield recalculation, issuers currently may not rely on a calculation of bond yield performed as of the date of issue of the bonds. For those issues that meet the requirements of the new provision, bond yield is calculated only once as of the issue date.

Amended § 1.148–3T(c)(4) applies to any fixed yield issue within the meaning of § 1.150–1T(b)(5)–(6) (but without regard to the transitional rule in § 1.148–3T(b)(3)(ii)). In general, the yield on a fixed yield issue is computed once as of the date of issue (or, in the case of conversion of an issue of variable rate bonds to a fixed rate, as of the first rebate computation date following conversion on which date the issue is first treated as a fixed yield issue), and no event occurring subsequent to the date of issue of a fixed yield issue is taken into account in computing the yield on a fixed yield issue. In two specified circumstances involving certain failures to spend a significant amount of original proceeds of bonds at any time or certain expected redemptions of bonds within the first five years, yield recomputation is required on a fixed yield issue.

E. Modifications to § 1.148–4T—Allocation and Accounting Rules

Existing regulations. Under § 1.148–4T(c)(2)(i), bond proceeds are not treated as spent by check on the date the check is written for purposes of the arbitrage rebate rules unless the check is delivered or mailed no later than one business day after the date it is written.

Change. The amended regulation addresses an issuer concern regarding the difficulty of determining whether a check is actually mailed within one business day and provides a liberalized rule. Amended § 1.148–4T(c)(2)(i) provides that bond proceeds are treated as spent on the date a check is written if the check is reasonably expected to be delivered or mailed no later than three business days after that date.

F. Modifications to § 1.148–5T—Transactions Giving Rise to Imputed Receipts

1. Safe Harbors With Respect to Certain Accounts (§ 1.148–5T(b))

Existing regulations. If an issuer fails to invest bond proceeds or does not invest bond proceeds at arm's length, arbitrage diversion is possible. Existing § 1.148–5T(a) reserves the general rules on imputing earnings on bond proceeds. Existing § 1.148–5T(b) contains very complex safe-harbor rules that exempt issuers from imputing earnings on bond proceeds under certain circumstances.

Change. Amended § 1.148–5T(b) provides new safe harbors against imputation of earnings on bond proceeds. The new rules simplify the descriptions of accounts eligible for the safe harbors. A principal purpose of the general safe harbors is to recognize that bond proceeds may remain uninvested or invested at less than a market yield for legitimate, non-tax reasons. For example, it may be uneconomic or extremely inconvenient to invest large amounts of money for relatively short periods of time. In addition, it may be uneconomic to invest relatively small amounts of money.

One new safe harbor focuses on the length of time that bond proceeds are not fully invested. This safe harbor provides that no investment earnings are imputed on certain uninvested amounts in an eligible account for a period of not more than three consecutive business days, not to exceed 20 days in the aggregate for any bond year.

Another new safe harbor focuses on the average balance in an account. This safe harbor provides that no investment earnings are imputed on certain uninvested amounts in an eligible account during a bond year in which the average uninvested balance in the eligible account does not exceed $20,000. For purposes of computing average uninvested balance, an issuer may ignore amounts covered by the first safe harbor described in the preceding paragraph.

2. Excess Tax-Exempt Receipts (§ 1.148–5T(c)(2))

Existing regulations. This provision prohibits the use of high yielding tax exempt bonds in an escrow for the purpose of earning arbitrage. In particular, certain excess earnings on tax exempt investments are allocated to taxable investments to prevent the use of tax exempt investments in an escrow to earn arbitrage.

Change. The above-described transaction amounts to a "device" and is more appropriately address under section 149. Existing § 1.148–5T(c)(2) is deleted, and new § 1.149(d)–1T(d)(3) addresses the abuse prohibited by this provision. These changes are effective for bonds issued after May 28, 1991.

G. Modifications to § 1.148–8T—Definitions and Special Rules Relating to Required Rebate

1. Determination of Bond Year (§ 1.148–8T(b)(2))

Existing regulations. The bond year ends on the last day of the compounding interval used in computing yield on the issue under § 1.148–3T.

Change. Amended § 1.148–8T(b)(2) permits issuers to choose any ending date for a bond year as long as that date is within one year of the date of issue of the bonds. This modification provides more flexibility for issuers who seek to use the same bond year for several different bond issues for administrative convenience. Conforming changes to §§ 1.148–2T(e)(4) and 1.148–3T(b)(11) require that an issuer use the same compounding interval for computing yield on the bonds and yield on investment of gross proceeds of bonds.

2. Issue Price of Bonds Publicly Offered at a Discount (§ 1.148–8T(c)(2)(ii))

Existing regulations. For a publicly offered bond, the issue price is the initial offering price to the general public and not the price paid by the underwriter. This is the same definition of issue price as is used in section 1273 and section 1274. A reasonable expectations test is used to determine the initial public offering price because, on the date of issue, the exact price at whch the bonds subsequently will be sold to the general public may not be known. Substantially identical bonds offered at one price to the general public and at a discounted

price to institutional or other investors must be separately identified for purposes of determining the issue price of each bond. Separate reasonable expectations as to offering prices of these separately identified bonds must be established. This type of discount for sales to institutional investors is commonly known as an underwriter's concession.

Change. Existing § 1.148–6T(c)(2)(ii) is deleted. Issuers and underwriters are no longer required or permitted to identify and segregate bonds expected to be publicly offered to the general public at one price from those publicly offered to institutions at a concession. This change is effective for bonds issued after May 28, 1991.

3. Definition of Gross Proceeds (§ 1.148–8T(d)(3))

Existing regulations. Original proceeds are included within the definition of gross proceeds subject to arbitrage rebate under section 148. Excluded from the definition of original proceeds subject to rebate are certain administrative costs that are excluded from arbitrage yield restrictions (as contrasted with the arbitrage rebate requirements). In particular, excluded from the definition of original proceeds are certain administrative costs recoverable under §§ 1.103–13 (b)(5)(i)(A) and (c)(5). Under § 1.103–13(b)(5)(i)(A), an issuer is permitted to retain a yield spread of not more than .125 percent higher than bond yield on certain acquired obligations. Section 1.103–13(c)(5) permits certain administrative costs incurred with respect to acquired purpose obligations to be recovered in the yield on the acquired purpose obligations. Certain other similar costs or permitted yield spreads that are excluded from the arbitrage yield restrictions are not excluded from the definition of original proceeds subject to arbitrage rebate.

Change. In order to make the scope of the arbitrage rebate rules more consistent with the arbitrage yield restriction rules, amended § 1.148–8T(d)(3) adds to the previously described existing exclusions from the definition of original proceeds subject to arbitrage rebate those amounts attributable to the higher yields permitted under § 1.103–13(b)(5)(viii) and section 143(g)(2). Section 1.103–13(b)(5)(viii) permits a yield spread of not more than 1.5 percent higher than the bond yield for acquired program obligations. Section 143(g)(2) permits the yield on mortgage obligations acquired with proceeds of qualified mortgage bonds to exceed the yield on the bonds by not more than 1.125 percent.

H. Modifications to § 1.148–9T—Certain Rules Applicable for Purposes of Section 148 Generally

Existing regulations. There is no general anti-abuse rule similar to the "artifice or device" anti-abuse rule in § 1.103–13(j).

Change. In order to compensate for the deletion or dilution of some of the complex, specific anti-abuse rules in the arbitrage rebate regulations, new § 1.148–9T(g) makes the general arbitrage "artifice or device" anti-abuse rule in § 1.103–13(j) applicable for all purposes of section 148, including arbitrage rebate.

I. Addition to § 1.149(d)–1T—Restrictions on Advance Refundings

Existing regulations. Section 1.149–1T reserves rules on prohibited abusive transactions in connection with advance refundings of tax exempt obligations.

Change. New § 1.149(d)–1T(d)(3) prohibits certain abuses in advance refundings involving escrows funded with both taxable and tax exempt obligations which inappropriately take advantage of the spread between long-term tax exempt obligations and short-term taxable obligations. In general, earnings on bond proceeds invested in tax exempt obligations are not treated as gross proceeds and are therefore not subject to rebate. An irrevocable defeasance escrow funded with proceeds of tax exempt advance refunding bonds generally is prohibited from containing investments with a composite yield in excess of the yield on the advance refunding bond. Since, under section 148, investments in tax exempt bonds are deemed not to have a yield greater than the bonds, funding an escrow with long-term higher yielding tax exempt obligations and short-term taxable obligations would allow an issuer to earn a yield (based on the actual cash flows of the escrow) in excess of the advance refunding bond yield. New § 1.149–1T(d)(3) provides that an advance refunding bond will be treated as an abusive transaction under section 149(d)(4) if tax exempt investments are used inappropriately in an advance refunding escrow to earn arbitrage in the manner specified in the new regulation. New § 1.149–1T(d)(3) is effective prospectively.

J. Changes Announced in Notice 89–78

Existing regulations. In Notice 89–78, 1989–2 C.B. 390, the Internal Revenue Service announced that it would make certain specified changes to the existing arbitrage rebate regulations.

Change. This regulatory project incorporates all of the specified changes to the arbitrage rebate regulations announced in Notice 89–78, with one exception. Under this exception, this regulatory projects does not incorporate the change described in paragraph 11 of Notice 89–78 that would require the determination of the issue price to take into account the discounted offering price for certain sales of bonds to institutional purchasers at a discount from the general public offering price. Instead, as previously described, this regulatory project deletes existing § 1.148–8T(c)(2)(ii).

K. Addition to § 1.103–13—Arbitrage Bonds

Existing regulation. The definition of original proceeds subject to yield restriction does not exclude certain amounts that are excluded from the definition of gross proceeds for arbitrage rebate purposes.

Change. To the extent that amounts are excludable from the broad definition of "gross proceeds" for arbitrage rebate purposes, such amounts generally should be excluded from the definition of "proceeds" for arbitrage yield restriction purposes. In order to increase the consistency between the arbitrage yield restriction rules and the arbitrage rebate rules new § 1.103–13T clarifies that certain amounts excluded from the definition of original proceeds under § 1.148–8T(d)(3) are also excluded from the definitions of original proceeds and investment proceeds under § 1.103–13(b)(2). This change is consistent with the change to § 1.148–8T(d)(3).

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafing Information

The principal authors of these regulations are David A. Walton, Office of Tax Legislative Counsel, Department of the Treasury, and John J. Cross III, Office of the Assistant Chief Counsel (Financial Institutions & Products), Internal Revenue Service. However,

other personnel from the Service and the Treasury Department participated in their development.

List of Subjects in 26 CFR 1.61–1.281–4

Deductions, Exemptions, Income taxes, Reporting and recordkeeping requirements, Taxable income.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 continues to read in part:

Authority: 26 U.S.C. 7805 * * * Sections 1.148–0T through 9T also issued under 26 U.S.C. 148 (f) and (i). Section 1.149(d)–1T also issued under 26 U.S.C. 149(d)(7).

Par. 1a. The following new § 1.103–13T is added to read as follows:

§ 1.103–13T Exclusions from the definitions of original proceeds and investment proceeds (temporary).

(a) *In general.* For purposes of § 1.103–13(b)(2) and notwithstanding contrary definitions, those amounts excluded from the definition of "original proceeds" that is contained in § 1.148–8T(d)(3) are also excluded from the definitions of "original proceeds" and "investment proceeds" set forth in §§ 1.103–13(b)(2)(i) and 1.103–13(b)(2)(ii), respectively.

(b) *Effective date.* This provision applies to private activity bonds issued after December 31, 1985, and to bonds other than private activity bonds issued after August 31, 1986.

Par. 2. Section 1.148–0T is amended as follows:

1. The introductory text of paragraph (b)(2)(ii)(B) is revised.
2. New paragraphs (b)(4) and (b)(5) are added.
3. Paragraph (d) is revised.
4. The added and revised provisions read as follows:

§ 1.148–0T Scope and effective date of restrictions on arbitrage (temporary).

* * * * *

(b) * * *
(2) * * *
(ii) * * *

(B) * * * The provisions of § § 1.148–1T through 1.148–8T shall not apply, and the final rebate shall be considered timely paid, in the case of any bond that is part of an issue if— * * *

* * * * *

(4) *Prospective effective date for change to special rule regarding excess tax exempt receipts.* Section 1.148–5T(c)(2), as amended to reflect the removal of former § 1.148–5T(c)(2) as originally promulgated on May 15, 1989, applies to a bond issued after May 28, 1991. See § 1.148–1T(d)(3).

(5) *Prospective effective date for removal of special issue price rule regarding concessions.* Section 1.148–8T(c)(2)(ii), as amended to reflect the removal of former § 1.148–8T(c)(2)(ii) as originally promulgated on May 15, 1989, applies to a bond issued after May 28, 1991.

* * * * *

(d) *List of subjects.* This paragraph (d) lists the captioned paragraphs contained in §§ 1.148–1T through 1.148–9T.

§ 1.148–1T. Required rebate to the United States (temporary).

(a) General rule.
(b) Required rebate.
(1) General rule.
(i) Rebate installments.
(ii) Final rebate.
(2) Income included in final rebate.
(i) In general.
(ii) Final payment period.
(iii) Final payment rate.
(iv) De minimis rule.
(3) Payment of required rebate.
(i) Rebate installment.
(ii) Final rebate.
(iii) De minimis rule.
(iv) Series of issues. [Reserved]
(v) Method of payment.
(c) Certain failures not to result in loss of tax exemption.
(1) Innocent failures may be corrected without penalty.
(i) In general.
(ii) Innocent failure.
(iii) Aggregation rule.
(2) Correction amount.
(i) In general.
(ii) Installment failure.
(iii) Correction period.
(iv) Correction rate.
(3) Payment of penalty in lieu of loss of tax exemption.
(d) Recovery of overpayment. [Reserved]
(e) Exemption from gross income of sum rebated. [Reserved]

§ 1.148–2T. Computation of rebatable arbitrage (temporary).

(a) General rule.
(1) Nonpurpose receipts.
(2) Nonpurpose payments.
(b) Determination of nonpurpose receipts and payments.
(1) In general.
(2) Receipts.
(i) Actual receipts.
(ii) Disposition receipt.
(iii) Installment date receipt.
(iv) Rebate receipt.
(v) Imputed receipt.
(3) Payments.
(i) Direct payment.
(ii) Constructive payment.
(iii) Rebate payment.
(iv) Coordination with correction amount.
(4) Computation date credit.
(i) In general.
(ii) Credit amount.
(iii) Eligible computation date.
(5) Certain lower yielding investments not taken into account.
(i) Advance refunding escrows.
(ii) Certain reserve or replacement funds.
(c) Computation of future value.
(1) In general.
(2) Examples.
(d) Determination of fair market value.
(1) In general.
(2) Established securities market.
(3) Restricted escrows.
(i) In general.
(ii) Exception.
(4) Certain SLGs.
(5) Investment contract.
(e) Computation of present value.
(1) In general.
(2) Discount rate.
(i) In general.
(ii) Special rules for restricted escrows.
(3) Disposition assumption.
(4) Compounding interval.
(5) Approximate method.
(i) In general.
(ii) Eligible investment.
(6) Example.

§ 1.148–3T. Computation of yield on issue (temporary).

(a) In general.
(b) Definitions and special rules.
(1) Fixed yield issue.
(i) In general.
(2) Transition rule.
(2) Variable yield issue.
(i) In general.
(ii) Yield period.
(3) Conversion to fixed yield.
(i) Conversion to fixed yield bond.
(ii) Conversion to fixed yield issue.
(4) Yield-to-call bond.
(i) In general.
(ii) Yield-to-call bond.
(iii) Exceptions.
(5) Bond yield.
(i) In general.
(ii) Yield-to-maturity.
(iii) Lowest yield.
(6) Retirement prices.
(i) In general.
(ii) Stated retirement price.
(7) Early retirement value.
(i) In general.
(ii) Tender bond.
(iii) Special rules for certain discount bonds subject to mandatory early redemption.
(iv) Special rule for certain early redemptions.
(8) Present value.
(i) In general.
(ii) Discount rate, etc.
(iii) Approximate method.
(iv) Special present value for large fixed yield issues.
(9) Special rules for variable yield bonds.
(10) Actually paid.
(i) In general.
(ii) Unconditionally payable.
(11) Compounding interval.
(i) Bond.
(ii) Issue.
(12) Qualified guarantees.

Par. 3. Section 1.148–1T is amended as follows:

1. Paragraph (b)(1) is revised.
2. Paragraph (b)(2)(iv)(A) is revised.
3. Paragraph (b)(3)(ii)(C) is revised.
4. The revised provisions read as follows:

§ 1.148–1T Required rebate to the United States (temporary).

* * * * *

(b) *Required rebate*—(1) *General rule.* An issue meets the requirements of this section if—

(i) *Rebate installments.* An amount which, when added to all previous rebate payments made with respect to the issue, equals at least 90 percent of the sum of the rebatable arbitrage plus all previous rebate payments as of each installment computation date; and

(ii) *Final rebate.* All of the rebatable arbitrage as of the final computation date and any income attributable to the rebatable arbitrage; is paid to the United States in accordance with the requirements of paragraph (b)(3) of this section. See § 1.148–8T(b)(1) for definitions of installment and final computation date. See § 1.148–2T for computation of rebatable arbitrage. See paragraph (b)(2) of this section for income included in final rebate.

(2) * * *

(iv) * * *

(A) The amount described in paragraph (b)(2)(i) of this section is less than $300; or

* * * * *

(3) * * *

(ii) * * *

(C) The date 60 days after the earlier of the date the issuer no longer reasonably expects section 148(f)(4)(B) (relating to temporary investment exception) to apply to the issue, and the date 12 months after the date of issue.

* * * * *

Par. 4. Section 1.148–2T is amended as follows:

1. Paragraphs (b)(4)(ii) and paragraph (b)(4)(iii) are revised.
2. The second sentence of paragraph (c)(2) *Example 1* (i) is revised.
3. Paragraphs (c)(2) *Example 1* (iii) and (c)(2) *Example 1* (iv) are revised.
4. The last sentence of paragraph (c)(2) *Example 2* (i) is revised.
5. Paragraph (c)(2) *Example 2* (ii) is revised.
6. Paragraph (c)(2) *Example 3* is revised.
7. The second sentence of paragraph (e)(2)(i) is revised.
8. Paragraph (e)(2)(iii) is removed.
9. Paragraph (e)(4) is revised.
10. The revised provisions read as follows:

§ 1.148–2T Computation of rebatable arbitrage (temporary).

* * * * *

(b) * * *

(4) * * *

(ii) *Credit amount.* The computation date credit with respect to an issue on an eligible computation date is $3,000.

(iii) *Eligible computation date.* For purposes of this paragraph (b)(4), a computation date is an eligible computation date unless that date is less than one year after the immediately preceding computation date (or the date of issue if that date is the first computation date).

* * * * *

(c) * * *

(2) * * *

Example 1. (i) * * * As selected by City A, the compounding interval is each 6-month (or shorter) period ending July 1 and January 1, and the bond year is each 1-year (or shorter) period ending January 1. * * *

* * * * *

(iii) The first installment computation date is January 1, 1992. See § 1.148–8T(b)(1)(ii). The yield on the issue is 7.000 percent per annum compounded semiannually (computed on a 30 day month/360 day year basis). The rebatable arbitrage as of the first installment computation date is $159,590.74, computed as follows:

Date	Receipts (payments)	FV (7.000 percent)
1/15/87	$(49,000,000.00)	$(68,934,646.17)
2/01/87	2,000,000.00	2,805,068.27
4/01/87	5,000,000.00	6,932,714.69
6/01/87	15,000,000.00	20,561,011.00
9/01/87	20,000,000.00	26,947,161.62
1/01/88	9,000,000.00	11,851,281.33
1/01/92	(3,000.00)	(3,000.00)
Rebatable arbitrage (1/01/92)		$159,590.74

The initial $49 million investment and each daily reinvestment of a cash dividend is a nonpurpose payment. See paragraph (b)(3)(i) of this section. Each daily cash dividend and each amount received from redemption of the mutual fund shares is a nonpurpose receipt. See paragraph (b)(2)(i) of this section. Each nonpurpose receipt arising from a daily cash dividend can be netted against the nonpurpose payment arising from the reinvestment of that dividend. Accordingly, the above computation reflects only the initial $49 million nonpurpose payment, the 5 nonpurpose receipts arising from the mutual fund share redemptions, and the $3,000 computation date credit under paragraph (b)(4) of this section.

(iv) City A pays 90 percent of the rebatable arbitrage ($143,631.67) to the United States on February 28, 1992. City A redeems all the bonds on January 1, 1994. The final computation date is January 1, 1994. See § 1.148–8T(b)(1)(iii). The yield on the fixed yield issue is 7.000 percent per annum compounded semiannually. This yield is used to future value the receipts and payments from the date of issue to the final computation date. See paragraph (c)(1) of this section. The rebatable arbitrage as of the final computation date is $17,099.19, computed as follows:

Date	Receipts (payments)	FV (7.000 percent)
1/15/87	$(49,000,000.00)	$(79,104,092.02)
2/01/87	2,000,000.00	3,218,880.36
4/01/87	5,000,000.00	7,955,449.56
6/01/87	15,000,000.00	23,594,233.04
9/01/87	20,000,000.00	30,922,487.77
1/01/88	9,000,000.00	13,599,617.92
1/01/92	(3,000.00)	(3,442.57)
2/28/92	(143,631.67)	(163,034.87)
1/01/94	(3,000.00)	(3,000.00)
Rebatable arbitrage (1/01/94)		$17,099.19

Example 2. (i) * * * The rebatable arbitrage as of the first installment computation is the same as in *Example 1* (iii) ($159,590.74).

(ii) City A pays 90 percent of the rebatable arbitrage ($143,631.67) to the United States on February 28, 1992. The yield on the variable yield issue during the second yield period (the period beginning after the close of business on the first installment computation date and ending on the final computation date, 1/01/94) is 6.500 percent per annum compounded semiannually. This yield is used to future value the receipts and payments after the first installment computation date (1/01/92). See paragraph (c)(1) of this section. The rebatable arbitrage as of the final computation date is $16,781.98, computed as follows:

Date	Receipts (payments)	FV (7.000/6.500 percent)
1/15/87	$(49,000,000.00)	$(78,342,565.99)
2/01/87	2,000,000.00	3,187,892.56
4/01/87	5,000,000.00	7,878,863.36
6/01/87	15,000,000.00	23,367,094.06
9/01/87	20,000,000.00	30,624,800.52
1/01/88	9,000,000.00	13,468,695.95
1/01/92	(3,000.00)	(3,409.43)
2/28/92	(143,631.67)	(161,589.05)
1/01/94	(3,000.00)	(3,000.00)
Rebatable arbitrage (1/01/94)		$16,781.98

Alternatively, the rebatable arbitrage as of the final computation date could be computed as follows:

Date	Receipts (payments) rebatable arbitrage	FV (6.500 percent)
1/01/92	$159,590.74	$181,371.03
2/28/92	(143,631.67)	(161,589.05)
1/01/94	(3,000.00)	(3,000.00)
Rebatable arbitrage (1/01/94)		$16,781.98

Example 3. (i) The facts are the same as in *Example 2*, except that all the bonds are redeemed on January 1, 2001, and the issue is treated as a fixed yield issue after the close of business on the first installment computation date (1/01/92). See §1.148–3T(b)(3)(ii). The yield on the fixed yield issue as of the second installment computation date (1/01/97) is 7.500 percent per annum compounded semiannually. This yield is used to future value the receipts and payments after the first installment computation date. See paragraph (c)(1) of this section. The rebatable arbitrage as of the second installment computation date is $22,467.12, computed as follows:

Date	Receipts (payments)	FV (7.000/7.500 percent)
1/15/87	$(49,000,000.00)	($99,613,592.68)
2/01/87	2,000,000.00	4,053,446.91
4/01/87	5,000,000.00	10,018,077.36
6/01/87	15,000,000.00	29,711,564.40
9/01/87	20,000,000.00	38,939,832.67
1/01/88	9,000,000.00	17,125,622.30
1/01/92	(3,000.00)	(4,335.13)
2/28/92	(143,631.67)	(205,148.51)
1/01/97	(3,000.00)	(3,000.00)
Rebatable arbitrage (1/01/97)		$22,467.12

Alternatively, the rebatable arbitrage as of the second installment computation date could be computed as follows:

Date	Receipts (payments) rebatable arbitrage	FV (7.500 percent)
1/01/92	$159,590.74	$230,615.63
2/28/92	(143,631.67)	(205,148.51)
1/01/97	(3,000.00)	(3,000.00)
Rebatable arbitrage (1/01/97)		$22,467.12

(ii) City A computes the minimum required payment as follows:

Rebatable arbitrage	$22,467.12
Total of previous rebate payments	143,631.67
Total	166,098.79
90 percent of total	149,488.91
Less total of previous rebate payments	(143,631.67)
Equals	5,857.24
Rounded (minimum required payment)	5,800.00

City A pays $5,800.00 to the United States on February 28, 1997. The yield on the fixed yield issue as of the final computation date (1/01/01) remains 7.500 percent per annum compounded semiannually. This yield is used to future value the receipts and payments after the first installment computation date (1/01/92) and until the final computation date. See paragraph (c)(1) of this section. The rebatable arbitrage as of the final computation date is $19,465.37, computed as follows:

Date	Receipts (payments)	FV (7.000/7.500 percent)
1/15/87	$(49,000,000.00)	($133,728,338.16)
2/01/87	2,000,000.00	5,441,634.05
4/01/87	5,000,000.00	13,448,976.17
6/01/87	15,000,000.00	39,886,907.17
9/01/87	20,000,000.00	52,275,587.71
1/01/88	9,000,000.00	22,990,647.60
1/01/92	(3,000.00)	(5,819.79)
2/28/92	(143,631.67)	(275,405.88)
1/01/97	(3,000.00)	(4,027.41)
2/28/97	(5,800.00)	(7,696.09)
1/01/01	(3,000.00)	(3,000.00)
Rebatable arbitrage (1/01/01		$19,465.37

Alternatively, the rebatable arbitrage as of the final computation date could be computed as follows:

Date	Receipts (payments) rebatable arbitrage	FV (7.500 percent)
1/01/92	$159,590.74	$309,594.75
2/28/92	(143,631.67)	(275,405.88)
1/01/97	(3,000.00)	(4,027.41)
2/28/97	(5,800.00	(7,696.09)
1/01/01	(3,000.00)	(3,000.00)
Rebatable arbitrage (1/01/01)		$19,465.37

Alternatively, the rebatable arbitrage as of the final computation date could be computed as follows:

Date	Receipts (payments) rebatable arbitrage	FV (7.500 percent)
1/01/97	$22,467.12	$30,161.45
2/28/97	(5,800.00)	(7,696.09)
1/01/01	(3,000.00)	(3,000.00)
Rebatable arbitrage (1/01/01)		$19,465.37

* * * * *

(e) * * *

(2) * * *

(i) * * * The yield on an investment that is allocated to an issue is the discount rate that produces the same present value when used in computing the present value of all the receipts received and to be received with respect to the investment, and the present value of all the payments with respect to the investment. * * *

* * * * *

(4) *Compounding interval.* For purposes of computing the present value of and yield on an investment, the compounding interval is the same as the compounding interval (as defined in § 1.148–3T(b)(11)) used in computing the yield on the issue.

* * * * *

Par. 5. Section 1.148–3T is amended to read as follows:

1. Paragraphs (b)(4)(i) and (b)(4)(ii) (A) and (B) are revised.

2. New paragraph (b)(4)(iii) is added.

3. The fourth sentence of paragraph (b)(5)(i) is removed.

4. Paragraph (b)(5)(111) is revised.

5. Paragraph (b)(6)(ii)(B) is revised.

6. Paragraph (b)(7)(i) is revised.

7. New paragraphs (b)(7)(iii) (C) and (D) are added.

8. New paragraph (b)(7)(iv) is added.

9. Paragraph (b)(8)(ii)(A) is revised.

10. Paragraph (b)(10)(ii)(A) is revised.

11. Paragraph (b)(11) is revised.

12. Paragraphs (b)(12)(ii)(C)(*2*), (b)(12)(iii), (b)(12)(vi), and (b)(12)(viii)(B) are revised.

13. Paragraph (c)(4) is revised.

14. A sentence is added after the last sentence in paragraph (c)(7) *Example 1* (i).

15. The fourth and fifth sentences of paragraph (c)(7) *Example 1* (ii) are revised.

16. Paragraph (c)(7) *Example 1*(iii) is revised.

17. Paragraph (c)(7) *Example 2* is revised.

18. Paragraph (c)(7) *Example 4*(iv) is removed.

19. Paragraph (c)(7) *Example 5* is revised.

20. The last sentence of paragraph (c)(7) *Example 7* (ii) is revised.

21. Paragraphs (c)(7) *Example 7* (iii) and (iv) are removed.

22. Paragraph (c)(7) *Example 7* (v) is redesignated as paragraph (c)(7) *Example 7* (iii).

23. The first sentence of newly designated paragraph (c)(7) *Example 7* (iii) is revised.

24. The first sentence of paragraph (c)(7) *Example 9* (ii) is revised.

25. The seventh sentence of paragraph (c)(7) *Example 9* (iii) is revised.

26. Paragraph (d)(4) *Example 3* (i) is revised.

27. A sentence is added after the second sentence in paragraph (d)(4) *Example 9* (ii).

28. Paragraph (d)(4) *Example 9* (iii) and (d)(4) *Example 9* (iv) is revised.

29. Paragraph (d)(4) *Example 10* is revised.

30. The revised provisions read as follows:

§ 1.148–3T Computation of yield on issue (temporary).

* * * * *

(b) * * *

(4) * * *

(i) *In general.* A yield-to-call bond is treated as if the lowest yield date were the final maturity date and the stated retirement price on the lowest yield date were the stated retirement price on the final maturity date. If a bond to which the preceding sentence applies is not retired on or before the lowest yield date and an event described in § 1.148–3T(c)(4)(ii) or § 1.148–3T(c)(4)(iii) has occurred with respect to the bond, the bond is treated as if it were retired on that date for the stated retirement price on that date, and is treated as if issued on that date (as part of the same issue) for an issue price equal to that price (less any amount included in that price and paid to discharge principal or interest on that date). See paragraph (c)(7) of this section (*Examples 4, 5,* and *6*) for fixed yield bonds and paragraph (d)(4) of this section (*Example 3*) for current index bonds.

(ii) * * *

(A) Any bond, other than a bond described in paragraph (b)(4)(iii) of this section, that is part of a fixed yield issue if the yield-to-maturity on the bond is more than one fourth of 1 percent higher than the lowest yield;

(B) Any fixed yield bond or current index bond, other than a bond described in paragraph (b)(4)(iii) of this section, that is part of a variable yield issue if the yield-to-maturity on the bond is more than one sixteenth of 1 percent higher than the lowest yield; and

* * * * *

(iii) *Exceptions.* A bond is not treated as a yield-to-call bond under this paragraph (b)(4), if—

(A) The bond is not subject to redemption prior to maturity, or

(B)(*1*) The bond is a fixed yield bond,

(*2*) The stated rate of interest on the bond remains constant during its term, and

(*3*) The excess of the issue price of the bond over the stated retirement price of the bond at maturity, stated as a percentage of the stated retirement price of the bond, is not greater than one fourth of 1 percent multiplied by the number of complete years to the first date on which the issuer or any ultimate obligor (or related person, as defined in section 147(a)(2)) has a right (under the terms of the bond or pursuant to a separate agreement or option entered into in connection with the issuance of the bond) to retire, redeem, or purchase the bond. For purposes of the preceding sentence, issue price and stated retirement price do not include accrued interest for a period of up to 6 months.

* * * * *

(5) * * *

(iii) *Lowest yield.* The term "lowest yield" means, with respect to a bond, the yield on the bond determined by assuming the bond is retired on the lowest yield date for the stated retirement price on such date. For purposes of computing the lowest yield, the stated retirement price on the lowest yield date shall be treated as an unconditionally payable payment of principal and interest, and the lowest yield date is the date that when used in computing the yield on the bond produces the lowest yield.

(6) * * *

(ii) * * *

(B) *Right to retire.* A person has a right to retire or redeem a bond as of a date even if the exercise of the right is subject to a contingency, provided that a right to redeem a bond only in the event of a remote contingency is not taken into account unless and until the remote contingency occurs. An example of a remote contingency is the destruction or condemnation of facilities financed with proceeds of the issue of which the bond is a part or, if the requirements of § 1.103–14(b)(1) are met as of the date of issue, the subsequent failure to spend proceeds of an issue.

(7) * * *

(i) *In general.* Except as otherwise provided in this paragraph (b)(7), the early retirement value of a bond on any date is the lesser of—

(A) The present value of the bond on such date; and

(B) If the bond is part of a fixed yield issue (without regard to paragraph (b)(3)(ii) of this section) and the yield to maturity on the bond is higher than the lowest yield, the lowest stated retirement price (properly adjusted to take into account accrued interest) on any day during the period beginning one year before such date and ending 90 days after such date. See paragraph (c)(7) of this section (*Examples 2, 4, 5, 7,* and *9*) for fixed yield bonds and paragraph (c)(4) of this section (*Examples 1–3*) for current index bonds.

* * * * *

(iii) * * *

(C) *Exception for certain discount bonds.* Notwithstanding anything to the contrary in paragraphs (b)(7)(iii) (A) and (B) of this section, this paragraph (b)(7)(iii) applies to a bond issued at discount only if—

(*1*) The amount of the discount is greater than one-fourth of 1 percent multiplied by the number of complete years from the date of issue to the final maturity date;

(*2*) The amount of discount is greater than one-eighth of 1 percent multiplied by the number of complete years from the date of issue to the final maturity date and the first mandatory early redemption date is more than 15 years before the final maturity date; or

(*3*) The amount of bonds subject to mandatory redemption on any date is more than 10 percent greater than the amount of bonds subject to mandatory redemption or payable at maturity on any later date.

(D) *Determination of discount.* The amount of discount is defined as the percentage obtained by dividing the excess of the stated retirement price over the issue price of a bond by the stated retirement price of the bond. For purposes of the preceding sentence, issue price and stated retirement price do not include accrued interest for a period of up to 6 months.

(iv) *Special rules for certain early redemptions.* The early retirement value of a bond is the amount specified in paragraph (b)(7)(iv) (A) or (B) of this section if the bond is redeemed before the final maturity date and a recomputation of yield is required pursuant to § 1.148–3T(c)(4) (ii) or (iii).

(A) *Bond redeemed pursuant to its terms.* In the case of a bond redeemed pursuant to its terms, the early retirement value is an amount equal to the actual redemption price of the bond (including call premium, if any).

(B) *Other bonds.* For any redemption not described in paragraph (b)(7)(iv)(A) of this section, the early retirement value is an amount equal to the sum of the issue price for the bond, determined under § 1.148–8T(c), and the amount of accrued original issue discount, determined under section 1288(a).

(8) * * *

(ii) * * *

(A) *In general.* For purposes of computing the present value of a bond, the yield-to-maturity on the bond shall be used as the discount rate, and the bond shall be assumed to be retired on the final maturity date for the stated retirement price on such date.

* * * * *

(10) * * *

(ii) * * *

(A) *In general.* A payment of principal or interest on a bond is unconditionally payable if the amount of the payment and the date the amount is actually and unconditionally due are fixed and determinable as of the date of issue (determined by assuming that no payment is paid before the latest date the payment is actually and unconditionally due). A payment shall not be treated as unconditionally payable to the extent that it is not reasonably certain on the date of issue of the bond that the payment actually will be paid.

* * * * *

(11) *Issue.*—(i) *Bond.* The compounding interval used in computing the yield on and the present value of a bond is the compounding interval used with respect to each bond that is part of the issue.

(ii) *Issue.* The compounding interval used in computing the yield on an issue and the present value of amounts under paragraphs (c)(1) and (d)(1) of this section is any compounding interval of not more than one year that is used with respect to each bond that is part of the issue.

(12) * * *

(ii) * * *

(C) * * *

(*2*) An entity that is not exempt from Federal income taxation and that is a bank (within the meaning of section 581 or 585(a)(2)(B)), is rated in one of the two highest (e.g., "AA," "AAA," "Aa," or "Aaa") categories for unsecured debt or insurance underwriting or claims paying ability by a nationally recognized rating agency, or by issuing its policies causes obligations insured thereby to be rated in one of the two highest categories; and

* * * * *

(iii) *Reasonable charge.* A guarantee of a bond does not meet the requirements of this paragraph (b)(12) if the payments for the guarantee of the bond exceed a reasonable charge for the transfer of credit risk. In determining whether this requirement is met, there shall be taken into account payments charged by guarantors in comparable transactions (including transactions in which the guarantor has no involvement other than as guarantor). In no event will this requirement be considered met unless the present value of the guarantee payments on the issue is less than the present value of the interest expected to be saved on the issue as a result of the guarantee. Present value is computed by using the yield-to-maturity on the issue (with regard to payments for the guarantee) as the discount rate.

* * * * *

(vi) *When payment coincide.* For purposes of paragraph (b)(12)(v)(A) of this section, payments on a purpose investment and a bond coincide if—

(A) The payments are actually and unconditionally due during the same compounding interval used in computing the yield on the bond, determined by taking into account only payments of interest on the bond;

(B) The payments are actually and unconditionally due during the same compounding interval used in computing the yield on the bond, determined by taking into account only payments of principal on the bond; or

(C) The payments on the bond are actually and unconditionally due no later than one month after the payments on the purpose investment.

In applying this paragraph (b)(12)(vi) to an issue, there shall not be taken into account any discrepancy of no more than one month, or any amount less than $250,000 that is required to be used to redeem bonds no later than the first available call date.

* * * * *

(viii) * * *

(B) The yield on the investment is not reasonably expected to be materially higher than the yield on the issue (within the meaning of § 1.103–13(b)(5)(i)(A), or, in the case of investments in acquired program obligations, within the meaning of § 1.103–13(b)(5)(viii)) but determined—

* * * * *

(c) * * *

(4) *Special rule regarding frequency of yield computations on fixed yield issues*—(i) *Generally no yield recomputation.* In general, no event occurring subsequent to the date of issue of a fixed yield issue (without regard to paragraph (b)(1)(ii) of this section) is taken into account in computing the yield on a fixed yield issue. Except for any yield adjustment to account for an event described in paragraph (c)(4)(ii) or (c)(4)(iii) of this section, the yield on a fixed yield issue is the yield on the issue determined by treating the date of issue (or for an issue treated as a fixed yield issue under § 1.148–3T(b)(3)(ii), the computation date on which it was first treated as a fixed yield issue) as the only computation date.

(ii) *Recomputation of yield in case of failure to spend proceeds.* The yield on a fixed yield issue is adjusted to take into account the retirement of any bonds that are part of the issue (whether by redemption, purchase, or otherwise) prior to their final maturity date or scheduled early retirement date with original proceeds of the issue if the cumulative aggregate amount of original proceeds used for this purpose exceeds 25 percent of the original proceeds of the issue.

(iii) *Recomputation of yield in case of certain early redemptions.* The yield on a fixed yield issue is adjusted to take into account the following events:

(A) The retirement (other than with original proceeds of the issue) of any bond that is part of the issue (whether by redemption, purchase, or otherwise) prior to its final maturity date or scheduled early retirement date and prior to the date that is 5 years from the date that the issue is first treated as a fixed yield issue; or

(B) The expected retirement of any bond that is part of the issue (whether by redemption, purchase, or otherwise) prior to its final maturity date or scheduled early retirement date if prior to the date that is 5 years after the date that the issue is first treated as a fixed yield issue, cash or nonpurpose investments (other than original proceeds of the issue) have been deposited into a fund that is reasonably expected to be used for that early retirement, or the issuer has contractually obligated itself to carry out that early retirement, regardless of whether that early retirement actually occurs.

For purposes of this paragraph (c)(4), amounts derived by an issuer from a purpose investment are not treated as original proceeds of an issue, unless such amounts are derived from amounts originally lent or otherwise advanced by the issuer to the conduit obligor under the purpose investment or earnings thereon that have not been expended by the conduit obligor for the governmental purpose of the issue. See paragraph (c)(7) of this section (*Examples 1, 2, 3, 6, 8,* and *10*).

* * * * *

(7) * * *

Example 1. (i) * * * All of the proceeds of the bonds are spent within three years.

(ii) * * * The bonds are not yield-to-call bonds because the yield-to-maturity on the bonds (9.963 percent, the same as the yield on the issue to maturity computed above) is not more than one fourth of one percent higher than the lowest yield on the bonds (9.979 percent, the same as the yield on the issue to the first par call date computed in subdivision (iii) below), and because the issue price of the bonds is not higher than the stated redemption price at maturity. See paragraphs (b)(4)(ii)(A), (b)(4)(iii)(B), (b)(5)(ii), and (b)(5)(iii) of this section.

(iii) All the bonds are redeemed on July 1, 1995, at par plus accrued interest ($22 million). Because all bond proceeds were expended and the redemption of the bonds took place after the first installment computation date, no recomputation of the yield is required, and the yield on the bonds is 9.963 percent. See paragraph (c)(4)(i) of this section.

Example 2. The facts are the same as in *Example 1,* except that all the bonds are retired on September 15, 1991, for $17.5 million. Since the bonds are retired other than pursuant to their terms, the aggregate early retirement value of the bonds on September 15, 1991, is the issue price of the bonds, plus any accrued original issue discount. See paragraph (b)(7)(iv)(A) of this section. The aggregate early retirement value of the bonds is par plus accrued interest ($20,411,111.11). The yield on the issue as of the final computation date (9/15/91) is 9.982 percent per annum compounded annually, computed as follows:

Date	Issue payments	PV (9.98208583 percent)
07/01/88	$2,000,000.00	$1,937,563.80
07/01/89	2,000,000.00	1,761,708.54
07/01/90	2,000,000.00	1,601,814.08
07/01/91	2,000,000.00	1,456,431.81
09/15/91	20,411,111.11	14,575,815.10
		21,333,333.33

See paragraphs (c)(2)(i) and (c)(2)(iii) of this section.

* * * * *

Example 5. The facts are the same as in *Example 4,* except that the 2003 bond is retired from monies other than bond proceeds on July 1, 2000, and the 2008 bond is retired from monies other than bond proceeds on July 1, 2001. Even though the 2003 bond is outstanding after the lowest yield date (7/01/98), the 2003 bond nonetheless is treated as if it were retired for $10.8 million on July 1, 1998 (the stated retirement price on such date). See paragraph (b)(4)(i) of this section. No adjustment to the yield on the issue is made to reflect the fact that the 2003 bond remained outstanding beyond the lowest yield date. Since the retirement of the 2003 and 2008 bonds occurred after the first installment computation date, the yield on the issue remains 8.554 percent per annum, compounded annually. See paragraph (c)(4) of this section.

* * * * *

Example 7. * * *

(ii) * * * See paragraph (iii) of this example.

(iii) The special rule in paragraph (b)(7)(iii)(A) of this section for determining the early retirement value of certain discount bonds did not apply to the bonds, because the yield-to-maturity on the bonds is not more than one fourth of 1 percent lower than the composite yield-to-maturity determined as provided in paragraph (b)(8)(ii)(B) of this section (7.085 percent), and because the bond qualifies under the exception provided in paragraph (b)(7)(iii)(C) of this section. * * *

* * * * *

Example 9. * * *

(ii) The special rule in paragraph (b)(7)(iii)(A) of this section for determining the early retirement value of the bonds applies to the bonds, because the yield-to-maturity on the bonds is more than one fourth of 1 percent lower than the composite yield-to-maturity determined as provided in paragraph (b)(8)(ii)(B) of this section, and because the bonds do not meet the provisions in paragraph (b)(4)(iii) of this section. * * *

(iii) * * *

See paragraph (c)(2)(i), (c)(2)(iii), (c)(2)(iv), and (c)(3)(ii) of this section. * * *

* * * * *

(d) * * *

(4) * * *

* * * * *

Example 3. (i) The facts are the same as in *Example 2,* except that the bonds are subject to optional redemption at par plus accrued interest on December 1, 1990. County C spent all the proceeds of the issue before that date.

* * * * *

Example 9. * * *

(ii) * * * All the proceeds of the bonds are expended by that date. * * *

(iii) All the bonds are outstanding on the second installment computation date (9/01/98). The issue is treated as a fixed yield issue issued as of the first day of the second yield period (9/01/93), and each fixed yield bond that is part of the issue is treated as if issued after the close of business on such date for an issue price equal to the outstanding par amount of the bond on such date. See paragraphs (b)(3)(ii), (b)(7)(i), (b)(8)(i), (b)(8)(iii), and (d)(3)(ii) of this section. The yield on the fixed yield issue as of the second installment computation date is 8.338 percent per annum compounded semiannually, computed as follows:

Date	Debt service	Guarantee	PV (8.338 percent)
9/01/93		$4,515.05	$4,515.05
9/01/94	$2,125,000.00	4,515.05	1,962,473.75
9/01/95	2,125,000.00	4,515.05	1,808,535.34
9/01/96	2,125,000.00	4,515.05	1,666,672.01
9/01/97	2,125,000.00	4,515.05	1,535,936.58
9/01/98	2,125,000.00		1,412,455.09
9/01/99	2,125,000.00		1,301,660.69
9/01/00	2,125,000.00		1,199,557.12
9/01/01	2,125,000.00		1,105,462.65
9/01/02	2,125,000.00		1,018,749.05
9/01/03	27,125,000.00		11,983,982.68
PV issue prices (9/01/93)			25,000,000.00

Since no event described in paragraphs (c)(4)(ii) and (c)(4)(iii) has occurred, no further adjustment of the yield on this fixed yield issue is required. See paragraph (c)(4) of this section.

(iv) All the bonds are redeemed on September 1, 2000, at 103 percent of par ($25,750,000) plus accrued interest ($2,125,000). The yield on the fixed yield issue as of the final computation date (9/01/00) is 8.338 percent per annum compounded semiannually.

Example 10. The facts are the same as in *Example 9,* except that all the bonds are retired on March 1, 1997, at par. Because the bonds are retired on a date (3/01/97) that is less than five years from the date on which the issue was first treated as a fixed yield issue (9/01/93), the yield on the issue must be recomputed. See paragraph (c)(4)(iii) of this section. The yield on the fixed yield issue as

of the final computation date (3/01/97) is 8.330 percent per annum compounded semiannually, computed as follows:

Date	Debt service	Guarantee	PV (8.330 percent)
9/01/93		$4,515.05	$4,515.05
9/01/94	$2,125,000.00	4,515.05	1,962,618.28
9/01/95	2,125,000.00	4,515.05	1,808,801.74
9/01/96	2,125,000.00	2,257.53	1,665,273.04
9/01/97	26,062,500.00		19,558,791.89
PV issue prices (9/01/93)			25,000,000.00

* * * * *

Par. 6. Section 1.148–4T is amended as follows:

1. Paragraph (c)(2) is revised.
2. The last of sentence of paragraph (e)(1)(iii) is revised.
3. The first and last sentences of paragraph (e)(2)(ii)(C) are revised.
4. A sentence is added after the last sentence in paragraph (e)(2)(ii)(C).
5. Paragraph (e)(2)(ii)(D) is revised.
6. New paragraph (e)(3) is added.
7. The added and revised provisions read as follows:

§ 1.148–4T Allocation and accounting rules (temporary).

* * * * *

(C) * * *

(2) *Expenditures from checking account.* An expenditure of proceeds in a checking or similar account may be treated as made—

(i) On the date a negotiable check is written on the account if the check is reasonably expected to be delivered or mailed no later than three business days after that date; or

(ii) On the date the check is delivered or mailed; if the payor has no reason to believe that the check will not clear within a reasonable period of time thereafter.

* * * * *

(e) * * *

(1) * * *

(iii) * * *

Any amount that was part of a bona fide debt service fund for the refunded issue shall be treated as described in paragraph (e)(1)(iii)(B).

* * * * *

(2) * * *

(ii) * * *

(C) * * * In the case of a refunding issue to which section 149(d)(4) applies, paragraph (e)(2)(i) of this section shall not apply on a date to the extent that it would cause the value of the nonpurpose investments allocated to the refunding portion of the issue to exceed the value of the bonds allocated (on a pro rata basis) to such portion of the issue. * * * For purposes of this paragraph (e)(2)(ii)(C), tax-exempt investments shall not be treated as tax-exempt, and investments allocated to gross proceeds (other than proceeds) shall not be treated as nonpurpose investments. If the refunding portion of the refunding issue refunds more than one refunded issue, the portion that refunds each refunded issue shall be treated as a separate issue for purposes of applying this paragraph (e)(2)(ii)(C).

(D) *No transfer in abusive cases.* Paragraph (e)(2)(i) of this section shall not apply to proceeds allocated to investments to the extent that the principal purpose for issuing any portion of the refunding issue is to cause such investments to cease to be allocated to the refunded issue (or to become allocated to the refunding issue). For purposes of applying the preceding sentence to investments in a restricted escrow, the purpose of restructuring debt service shall not be taken into account.

* * * * *

(3) *Separate issue treatment for conduit financings*—(i) *In general.* The portion of a refunded issue properly allocated to a conduit purpose investment shall be treated as a separate issue for purposes of applying paragraphs (e)(1) and (e)(2) of this section.

(ii) *Conduit purpose investment.* The term "conduit purpose investment" means any purpose investment if—

(A) The purpose investment is an eligible purpose investment (within the meaning of § 1.148–3T(b)(12)(viii); and

(B) The purpose investment meets the requirements of § 1.148–3T(b)(12)(v) (or could meet such requirements if the purpose investments were guaranteed).

Par. 7. Section 1.148–5T is amended as follows:

1. Paragraph (b) is revised.
2. Paragraph (c)(2) is removed.
3. Paragraph (c)(3) and (c)(4) are redesignated as (c)(2) and (c)(3).
4. The last sentence of newly designated paragraph (c)(3) *Example 1* (i) is revised.
5. The revised provisions read as follows:

§ 1.148–5T Transactions giving rise to imputed receipts (temporary).

* * * * *

(b) *Safe harbor to avoid imputation of investment earnings—(1) In general.* No investment earnings are imputed with respect to:

(i) *Time.* Any uninvested amount contained in an eligible account for a period of not more than three consecutive business days, not to exceed in the aggregate 20 days in any bond year.

(ii) *Average uninvested balance.* Any uninvested amount contained in an eligible account during a bond year in which the average uninvested balance contained in the eligible account does not exceed $20,000.

(2) *Definitions*—(i) *Uninvested amount.* An uninvested amount is an amount of gross proceeds that is uninvested, invested in a manner so that actual investment earnings cannot be determined (e.g., unintentionally lost or stolen records), or invested in a non-interest bearing demand or trust account.

(ii) *Average uninvested balance.* For any bond year, the average uninvested balance for any account is the sum of the uninvested amounts as of the close of each day in the bond year divided by the number of days in the bond year. For purposes of this paragraph (b)(2)(ii), any uninvested amount described in paragraph (b)(1)(i) of this section is not taken into account.

(iii) *Eligible account.* An eligible account is an account or fund containing gross proceeds of an issue meeting the following requirements:

(A) An eligible account cannot be created or availed of for the purpose of minimizing rebatable arbitrage.

(B) An eligible account must be consistent with the customary recordkeeping requirements and practices of its owner.

(C) Not more than 4 eligible accounts are permitted for any single owner with respect to any single bond issue.

(D) The issuer may not expect to receive a direct or indirect benefit from

uninvested amounts on deposit in an eligible account. Neither the owner of the eligible account nor any agent or officer of the owner may enter into any arrangement, formal or informal, designed to give the owner (or its designee) any benefit as a result of uninvested amounts on deposit in the eligible account.

(E) For purposes of this section, two or more accounts or funds may at the option of the owner or owners be considered to be a single account so long as all amounts contained in the funds or accounts are gross proceeds of the same issue.

(c) * * *

(3) * * *

Example 1. (i) * * * See paragraph (c)(2) of this section.

* * * * *

Par. 8. Section 1.148–8T is amended as follows:

1. Paragraph (b)(2) is revised.
2. The fourth sentence of paragraph (c)(1) is removed.
3. Paragraph (c)(2)(ii) is removed.
4. Paragraph (c)(2)(iii) is redesignated as (c)(2)(ii) and is revised.
5. Paragraph (c)(2)(iv) is redesignated as (c)(2)(iii).
6. Paragraph (d)(3) is revised.
7. The revised provisions read as follows:

§ 1.148–8T. Definitions and special rules relating to required rebate (temporary).

* * * * *

(b) * * *

(2) *Bond year.* The term "bond year" means, with respect to an issue, each 1-year period (or shorter period from the date of issue) that ends at the close of business on the day in the calendar year that is selected by the issuer. If no day is selected by the issuer before the earlier of the final maturity date of the issue or the date that is 5 years after the issue date, each bond year ends at the close of business on the day preceding the anniversary of the issue date.

* * * * *

(c) * * *

(2) * * *

(ii) *Bona fide offering required.* Paragraph (c)(2)(i) of this section does not apply to any bond that is not actually offered to the general public in a bona fide public offering for the issue price of the bond (determined without regard to this sentence).

* * * * *

(d) * * *

(3) *Original proceeds.* The term "original proceeds" means, with respect to an issue, any sale proceeds and any investment proceeds of the issue. The term also includes any amount recovered with respect to the issue under § 1.148–1T(d). The term does not include amounts actually or constructively received with respect to a purpose investment to the extent those amounts are properly allocated to administrative costs recoverable under § 1.103–13(c)(5) or to the higher yield permitted under § 1.103–13(b)(5)(i), § 1.103–13(b)(5)(viii), or section 143(g)(2). For purposes of the preceding sentence, a purpose investment that is a tax exempt bond is not treated as tax exempt.

* * * * *

Par. 9. Section 1.148–9T is amended as follows:

1. Paragraph (g) is redesignated as paragraph (h) and is revised.
2. New paragraph (g) is added.
3. The revised provision reads as follows:

§ 1.148–9T Certain rules applicable for purposes of section 148 generally (temporary).

* * * * *

(g) *Artifice or device.* Section 1.103–13(j) applies for purposes of section 148 generally, including for purposes of the calculations of yield, expenditures, and investment earnings under section 148(f). For purposes of § 1.103–13(j), enabling the issuer to retain significant additional rebatable arbitrage constitutes a "material financial advantage."

(h) *Effective date*—(1) *In general.* Except as otherwise provided in this paragraph (h), the provisions of this section apply to any issue sold after May 15, 1989, or issued after June 14, 1989.

(2) *Computation of yield on investments.* Paragraph (b) of this section may be applied in the case of any issue to which § 1.148–1T applies that is not described in paragraph (h)(1) of this section.

(3) *Investment property.* Paragraph (f) of this section shall apply to any bond that is not described in paragraph (h)(1) of this section to the same extent that section 148(b)(2) applies to such bond.

Par. 10. Section 1.149(d)–1T is amended by adding paragraph (d)(3) to read as follows:

§ 1.149(d)–1T. Restrictions on advance refundings (temporary).

* * * * *

(d) * * *

(3) *Mixed escrows*—(i) *In general.* Any issue any portion of which is a bond that is an advance refunding bond described in section 149(d)(5) is an issue described in section 149(d)(4) if—

(A) Any of the proceeds of the issue are invested in an advance refunding escrow in which a portion of the proceeds are invested in tax exempt bonds (within the meaning of § 1.148–8T(e)(3)) and a portion of the proceeds are invested in nonpurpose investments;

(B) The yield on the tax exempt bonds in the advance refunding escrow exceeds the yield on the bonds;

(C) The yield on all the investments (including investment property and tax exempt bonds) in the advance refunding escrow exceeds the yield on the bonds; and

(D) The weighted average maturity of the tax exempt bonds in the advance refunding escrow is more than 25 percent greater or less than the weighted average maturity of the nonpurpose investments in the advance refunding escrow, and the weighted average maturity of nonpurpose investments in the advance refunding escrow is greater than 60 days.

(ii) *Escrow.* For purposes of this § 1.149(d)–1T(d)(3), an advance refunding escrow means an advance refunding escrow as defined in § 1.148–8T(g), except that investments in the escrow may include both nonpurpose investments and tax exempt bonds.

(iii) *Effective date.* This paragraph (d)(3) applies to any bond issued after May 28, 1991, if any bond issued as part of the issue (of which such bond is a part) is issued to advance refund another bond (within the meaning of section 149(d)(5).

There is a need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impracticable to issue this Treasury decision with notice and public procedure under subsection (b) of section 553 of title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

Fred T. Golberg,

Commissioner of Internal Revenue.

Approved: April 11, 1991.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

[FR Doc. 91–9559 Filed 4–19–91; 3:22 pm]

BILLING CODE 4830–01–M

Internal Revenue Service

26 CFR Part 1

[T.D. 8317]

RIN 1545–AP13

Minimum Funding Requirements—Plan Restoration; Correction

AGENCY: Internal Revenue Service, Treasury.

ACTION: Correction to temporary regulations.

SUMMARY: This document contains corrections to temporary regulations published in the **Federal Register** for Tuesday, October 23, 1990, at page 42704 (55 FR 42704). The temporary regulation added new § 1.412(c)(1)–3T to the regulations governing the minimum funding requirements for qualified plans under section 412 of the Internal Revenue Code.

FOR FURTHER INFORMATION CONTACT: Michael J. Roach, (202) 566–6260 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulation added new § 1.412(c)(1)–3T to part 1 of title 26 of the Code of Federal Regulations. The temporary rule addressed the relationship between the funding requirements of section 412 of the Internal Revenue and the restoration provisions of section 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA").

Need for Correction

As published, the temporary regulation contain errors which may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the temporary regulation which was the subject of FR Doc. 90–24924, is corrected as follows:

1. In the preamble under the heading "Explanation of Provisions", on page 42707, column 1, line 16 from the top of the column, the phrase "be made at the valuation interest rate, if", is corrected to read "be made at the lesser of the initial current liability interest rate and the valuation interest rate, if".

2. On page 42707, column 1, in the first complete paragraph, line 6, the word "valuation" is corrected to read "appropriate".

3. On page 42707, column 1, last complete paragraph, line 11, the reference to "I.R.B. 43." is corrected to read "1990–43 I.R.B. 11."

§ 1.412(c)(1)–3T [Corrected]

4. In § 1.412(c)(1)–3T(g)(7), on page 42710, column 1, line 5 from the top of the column, the word "amount" is removed.

5. Also in § 1.412(c)(1)–3T(g)(7), on page 42710, column 1, line 9 from the top of the column, the language "amount computed at the current liability" is corrected to read "computed at the least of the valuation rate, the current liability interest rate and current liability".

Dale D. Goode,

Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 91–9410 Filed 4–24–91; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 09–91–05]

Special Local Regulations: Harbor Expo National Fireworks Championship, Lake Erie, Cleveland Harbor, Cleveland, OH

AGENCY: Coast Guard, DOT.

ACTION: Temporary rule.

SUMMARY: Special Local Regulations are being adopted for the Harbor Expo National Fireworks Championship to be held on Cleveland Harbor, Lake Erie, on the 28th and 29th of June 1991. The regulations are needed to provide for the safety of life and property on navigable waters during the event.

EFFECTIVE DATE: These regulations become effective at 9:40 p.m. (edst) and terminate at 11 p.m. (edst), each day, on the 28th and 29th of June 1991.

FOR FURTHER INFORMATION CONTACT: Corey A. Bennett, Marine Science Technician First Class, U.S. Coast Guard, Search and Rescue Branch, Ninth Coast Guard District, 1240 East 9th Street, Cleveland, Ohio 44199–2060, (216) 522–4420.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published for these regulations and good cause exists for making them effective in less than 30 days from the date of publication. Following normal rulemaking procedures would have been impracticable. The application to hold this event was not received until 21 March 1991, and there was not sufficient time remaining to publish proposed rules in advance of the event or to provide for a delayed effective date.

Drafting Information

The drafters of this rulemaking are Corey A. Bennett, Marine Science Technician First Class, U.S. Coast Guard, project officer, Search and Rescue Branch and M. Eric Reeves, Lieutenant Commander, U.S. Coast Guard, project attorney, Ninth Coast Guard District Legal Office.

Discussion of Regulations

The Harbor Expo National Fireworks Championship will be conducted at Dock Number 34 with the fireworks being fired over Cleveland Harbor. This event will have falling ash and debris, and an unusually large number of spectator craft in the area, which could pose hazards to navigation in the area. Any vessel desiring to transit the regulated area may do so only with prior approval of the Patrol Commander (Officer in Charge, U.S. Coast Guard Station Cleveland Harbor, OH.).

Economic Assessment and Certification

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact has been found to be so minimal that a full regulatory evaluation is unnecessary. This event will draw a large number of spectator craft into the area for the duration of the event. This should have a favorable impact on commercial facilities providing services to the spectators. Any impact on commercial traffic in the area will be negligible.

Since the impact of these regulations is expected to be minimal, the Coast Guard certifies that it will not have a significant economic impact on a substantial number of small entities.

Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 33 CFR Part 100

Marine Safety, Navigation (water).

Temporary Regulations

In consideration of the foregoing, part 100 of title 33, Code of Federal Regulations, is amended as follows:

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35.

2. Part 100 would be amended to add a temporary § 100.35–T0905 to read as follows:

§ 100.35–T0905 Harbor Expo National Fireworks Championship, Lake Erie, Cleveland Harbor, Cleveland, OH.

(a) *Regulated Area:* That portion of Cleveland Harbor from the east end of the Municipal Pier northward to the East Basin Channel Lighted Buoy 11 (LLNR 4055), then southwest to position 41 degrees 30 minutes 43.5 seconds North, 081 degrees 42 minutes 03 seconds West, thence southeast to shore at the east cornor of Dock Number 32.

(b) *Special Local Regulations:* (1) The above area will be closed to vessel navigation and anchorage, except when expressly authorized by the Coast Guard Patrol Commander, from 9:40 p.m. (edst) until 11 p.m. (edst), each day, on the 28th and 29th of June 1991.

(2) The Coast Guard will patrol the regulated area under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on channel 16 (156.8 MHZ) by the call sign "Coast Guard Patrol Commander". Any vessel, not authorized to participate in the event, desiring to transit the regulated area may do so only with prior approval of the Patrol Commander and when so directed by the officer.

(3) The Patrol Commander may direct the anchoring, mooring, or movement of any boat or vessel within the regulated area. A succession of sharp, short signals by whistle or horn from vessels patrolling the area under the direction of the U.S. Coast Guard Patrol Commander shall serve as a signal to stop. Any vessel so signaled shall stop and shall comply with the orders of the Patrol Commander. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(4) The Patrol Commander may terminate the marine event or the operation of any vessel at any time it is deemed necessary for the protection of life and property.

Dated: April 15, 1991.

G.A. Penington,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 91–9737 Filed 4–24–91; 8:45 am]

BILLING CODE 4910–14–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 90–643; RM–7579]

Radio Broadcasting Services; Columbia, IL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 285C3 for Channel 285A at Columbia, Illinois, and modifies the license for Station WCBW(FM) to specify operation on the higher class channel, at the request of WCBW, Inc. See 56 FR 01506, January 15, 1991. Channel 285C3 can be allotted to Columbia in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.2 kilometers (11.3 miles) northwest of the community. The site restriction is necessary in order to avoid a short-spacing to a construction permit for Station WQHC(FM), Channel 284A, Nashville, Illinois. The coordinates are North Latitude 38–34–24 and West Longitude 90–19–30. With this action, this proceeding is terminated.

EFFECTIVE DATE: June 3, 1991.

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 90–643, adopted April 8, 1991, and released April 19, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452–1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio Broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Illinois, is amended by removing Channel 285A and adding Channel 285C3 at Columbia.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–9692 Filed 4–24–91; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 89–500; RM–6970]

Radio Broadcasting Services; Stephenson, MI

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 292C2 for vacant Channel 272A at Stephenson, Michigan, in response to a petition filed by Pacer Radio of the Near-North (formerly Stephenson Radio Company). The coordinates for Channel 292C2 are 45–24–54 and 87–36–24. See 54 FR 48655, November 24, 1989. Canadian concurrence has been obtained for this allotment.

DATES: Effective June 3, 1991; the window period for filing applications will open on June 4, 1991, and close on July 5, 1991.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 89–500, adopted April 8, 1991, and released April 19, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center (202) 452–1422, 1714 21st Street NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Michigan, is amended by removing Channel 272A and adding Channel 292C2 at Stephenson.

Federal Communications Commission.

Andrew J. Rhodes,

Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–9691 Filed 4–24–91; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service

50 CFR Part 60

RIN 1018-AB51

Patuxent Wildlife Research Center Sport Fishing

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service (Service) is revising regulations published on December 15, 1966, codified at 50 CFR 60.10 that govern public use policy on the Patuxent Wildlife Research Center (Center). The existing restrictions that sport fishing would only be allowed in support of research are no longer necessary. This rule will permit public sport fishing on selected areas of the facility.

DATES: This rule will be effective May 28, 1991.

FOR FURTHER INFORMATION CONTACT: John P. Stasko, Chief, Branch of Facility Management, Patuxent Wildlife Research Center, Laurel-Bowie Rd., Laurel, Md. 20708 (telephone 301–498–0342).

SUPPLEMENTARY INFORMATION: The Patuxent Research Refuge (Refuge) was established by Executive Order 7514, dated December 6, 1936, in order to further the purposes of the Migratory Bird Conservation Act. The name of the Refuge was changed in 1956 to the Patuxent Wildlife Research Center (Center) but the mission of this facility—to help protect and conserve the Nation's wildlife and natural environment through research on critical environmental problems and issues—has remained virtually unchanged throughout its 50-year history.

Shortly after its opening, the Center began constructing two large lakes on the south side of its property. Cash Lake and Lake Redington were completed in 1939. These lakes were developed to provide habitat for a wide range of fish and wildlife. Much of the early work at the Center involved fish and their habitat. The recreational benefits of these lakes were also recognized. Cash Lake was opened to public fishing in 1940. Years later other impoundments were created on the facility and several of these were also opened to public fishing. People who fished the Center's impoundments were required to provide data about the kind of fish caught, their length, weight, etc.

Public fishing was discontinued at Cash Lake in 1957, when waterflow studies were initiated. As the research emphasis at the Center changed, the compatibility of a public fishing program began to be questioned. In 1966, a Rule published in the Code of Federal Regulations restricted fishing at the Center only to that which would provide research data to the Center's scientists. In 1969, fishing was discontinued.

Much has happened to the Patuxent Wildlife Research Center and its grounds since the late 1960's. Today, the Center encompasses 4700 acres. A large tract of land immediately adjacent to Cash Lake was acquired by the Center from the Beltsville Agricultural Research Center in 1975 for recreational and environmental education use. This property is a designated public use area and is separated from the main research complex by Maryland Route 197. Although the lakes on this area are managed to provide suitable habitat for waterfowl, no active waterfowl research is being conducted on this area.

In keeping with the Department of the Interior's efforts to develop recreational and environmental education opportunities for the public, including persons with disabilities, the Center proposed to open the lakes and ponds located in this designated public use area to the general public for the purpose of sport fishing.

Nine written comments were received. Each was reviewed by a committee including biologists from the Center, the Service's Fisheries Assistance Offices in Gloucester, Virginia, and from Maryland Department of Natural Resources (DNR). Service Refuge Law Enforcement personnel also participated in the review.

Five of the comments were inquiries about how and when to apply for a permit. One comment was from an individual who offered to volunteer to work with persons with disabilities that will participate in the program. Comments were received from the Sport Fishing Institute that supported and commended the Service for "refocusing management of federal lands to obtain public benefit." Two of the comments were very critical of the proposed rule. One of these was from the Potomac-Patuxent Chapter of Trout Unlimited (Trout Unlimited).

Trout Unlimited asked for a longer comment period. Because there were few comments and because the Service gave very careful consideration to the comments that were received, the Service believes a 30-day comment period is adequate.

Additionally, Trout Unlimited expressed concern that even with a limited number of permits issued, the proposed harvest program will quickly deplete the available fishery. They recommended that the program be "catch and release" and be restricted to the use of artifical baits and lures. They also were concerned that the proposed creel limit is too high for sunfish and that the minimum eligible sizes for bass and pickerel should be higher than proposed.

Considerable time was spent by the review committee discussing Trout Unlimited's points of concern in relationship to the programs goals and objectives. The Service's goal in reopening Cash Lake to public fishing is to provide a well-managed self-sustaining recreational fishing program that will provide accessibility and an enjoyable outdoor experience to a wide array of interested anglers in a highly urbanized area. Target users include persons with disabilities, children, the elderly, and low income families. The Service will manage Cash Lake to maintain a quality, self-sustaining recreational fishery that meets the needs of this diverse group of users.

Concerns regarding potential over harvest have been addressed by placing an aggregate daily limit of 15 on all species, other than bass and pickerel. This is considerably more restrictive than for other Maryland waters where there are no limits on these species. The limit on bass and pickerel is patterned after Maryland's trophy and slot limits for these species, but again is more conservative than the State program. Maryland DNR, working in conjunction with biologists from the Service, will conduct a 5 year study to evaluate the effects of the proposed management program on the fishery resource. If the data collected during this study indicates that the resource is being overfished, the Service will amend the regulations to ensure the program continues to meets its intended goals and objectives.

Consideration was given to making the program "catch and release only" and limited to artificial baits and lures. Because the program will be fully accessible to anglers with disabilities, the Service believes that a decision to restrict the use of natural baits will severely limit participation by disabled anglers that have not developed the skills required to manipulate artificial baits. Additionally, people with mobility impairments who must fish from specially designed facilities will not be able to fish the entire lake and take full advantage of fishing with artificial baits.

"Catch and release" was not adopted because of concerns with hooking mortality associated with the use of natural baits and because restrictions on catch are adequate to maintain self-sustaining populations. However, 'catch

and release" will be promoted and encouraged in all aspects of the program.

Problems with litter were also cited. Enforcement and maintenance staff at the facility have anticipated this and are prepared to manage and control this problem.

The final major comment received concerned boat restrictions. Specifically, they asked why there would be restrictions on kayaks and similar craft. The size of the lake cannot support a large number of boats. Area managers have had severe problems with the proliferation of various types of flotation devices on Maryland waters. Restricting the craft to the types listed will eliminate this concern.

Conformance With Statutory and Regulatory Authorities

The National Wildlife Refuge System Administration Act of 1966 (NWRSAA), as amended (16 U.S.C. 668dd), authorized the Secretary of the Interior (Secretary) to permit public access, use, and recreation on refuges whenever he/she determines that such uses are compatible with the major purposes for which such areas were established. The Service has determined that permitting controlled public sport fishing at the Center from June 15 through October 15 will not have a biological impact on waterfowl nesting on the area, will not interfere with research that is being conducted on the facility's main complex, and is compatible with the purposes for which the Refuge was established and with the purposes for which the land was acquired in the years since its establishment.

The provisions of the NWRSAA relating to recreation are administered in accordance with the Refuge Recreation Act of 1962 (16 U.S.C. 460k), which authorizes the Secretary to permit recreational uses on refuges if they are appropriate, incidental, or secondary uses. In conformance with that Act, the Service has determined that controlled public sport fishing, at the Refuge, governed by the regulations, permits a secondary use that is not inconsistent with the primary objectives for which it was established.

Futher, the recreational use will not interfere with the primary purposes for which the Refuge was established. The above determinations are based in large part on empirical data collected at the Refuge and have been previously described in the Refuge Master Plan. In addition, funds are available within the annual facility budget for the administration of the recreational activities that will be permitted by these regulations

Economic Effect

Executive Order 12291 of February 19, 1981, requires the preparation of regulatory impact analyses for major rules. A major rule is one likely to result in an annual effect on the economy of $100 million or more; as major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions, or significant adverse impact on the ability of the United States-based enterprises to compete with foreign-based enterprises. The Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.*) requires preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which will include small businesses, organizations, or government jurisdictions.

The rule is a minor adjustment to existing regulation for one refuge; therefore, this action will not have an adverse impact on the overall economy of a particular region, industry, or group of industries, or level of government. Although the rule alters the existing recreational uses of the refuge, small entities such as sporting goods stores, restaurants, motels, and local governments will not be significantly affected by the rule. Accordingly, the Department of the Interior has determined that this rule is not a "major rule" within the meaning of Executive Order 12291, and would not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Paperwork Reduction Act

This rule contains information collection requirements approved by the Office of Management and Budget under 44 U.S.C. 3501, et seq., and assigned clearance number 1018–0014.

Environmental Considerations

Pursuant to the requirements of the section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), and environmental assessment (EA) was prepared in 1989 on the effects of public use activities on the management of the Patuxent Wildlife Research Center as part of the Center Master Plan. An EA and a Finding of No Significant Impact (FONSI) were also prepared for the August 1990 rulemaking.

These documents are available for public inspection at the Library/Merriam Laboratory, Patuxent Wildlife Research Center, Laurel, Md. Copies of the EA and FONSI are available by mail from the Center.

Maps of the refuge are available from the Chief, Branch of Facility Management, Patuxent Wildlife Research Center, Laurel-Bowie Rd., Laurel, Md. 20708.

Primary author of this rule is John P. Stasko, Chief, Branch of Facility Management, Patuxent Wildlife Research Center.

List of Subjects in 50 CFR Part 60

Research, Wildlife.

PART 60—PATUXENT WILDLIFE RESEARCH CENTER

Accordingly, it is hereby proposed to amend 50 CFR part 60 is amended as set forth below:

1. The authority citation for part 60 is revised to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 668dd, 715i.

2. Section 60.10 is revised to read as follows:

§ 60.10 Public sport fishing.

The research center may be opened to public sport fishing, under such conditions and restrictions as may be required, when public sport fishing activities will provide recreational and environmental opportunities for the public, including persons with disabilities, and when these activities can be administered without affecting the primary mission of the Center. The sport fishing provisions set forth in part 33 of this chapter are equally applicable to the Patuxent Wildlife Research Center.

3. Section 60.11 is revised to read as follows:

§ 60.11 Special regulations; hunting and sport fishing.

Controlled public sport fishing will be permitted on the Patuxent Wildlife Research Center, Laurel, Md. The open area is confined to Cash Lake, comprising 54 acres, as delineated on a map available at the Center. All of the fresh water fishing and boating laws of the State of Maryland apply except as further restricted below:

(a) Species permitted to be taken: Bass, pickerel, catfish, and sunfish.

(b) Open season: June 15 through October 15: 6 a.m. to legal sunset daily.

(c) Daily creel limits:

(1) Bass, catch and release only, except keeping of one bass greater than 15 inches in length is permitted.

(2) Pickerel, catch and release only, except keeping of one pickerel greater than 15 inches in length is permitted.

(3) Sunfish and catfish, 15 per day total fish limit.

(d) Methods of fishing:

(1) Hook and line tackle and baits permitted by Maryland law, except no live minnows or other fish may be used for bait.

(2) Boats may be used by permittees subject to the following conditions:

(i) No gasoline motors permitted.

(ii) Boats may not be trailered to the water.

(iii) Boats other than conoes may not exceed 14 feet.

(iv) Sailboats and kayaks are not permitted.

(e) Special provisions: A federal permit is required to fish and a limit of 25 daily permits will be issued. Persons may request a permit application by addressing: Fishing Program, Patuxent Wildlife Research Center, Laurel-Bowie Rd., Laurel, Md. 20708. Each request must include the person's name, address, and phone number, and the model, year and license number of the vehicle that will drive to the Center. Requests will be accepted annually after May 1st. Requests should be made no later than 1 week prior to the requested fishing date. All requests will be filed. For dates where the number of requests exceeds the daily permit allocation, a random selection will determine successful permittees. Persons selected will be notified and the dates that they have been assigned will be listed. Each permit shall authorize the permit holder to be accompanied by one licensed angler or up to two children under the age of 16.

(f) The information collection requirements contained in § 60.11(e) have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*, and assigned clearance number 1018–0014. The information is being collected and used to determine eligibility for permit issuance. Response is required to obtain a benefit in accordance with the requirements of the Refuge Administration Act (16 U.S.C. 668dd). The public reporting burden for the permit application is estimated to average 6 minutes per response, including the time for reviewing instructions, gathering, and maintaining data, and completing and reviewing the forms. Direct comments regarding the burden estimate or any other aspect of this form to the Information Collection Clearance Officer, MS 224 ARLSQ, U.S. Fish and Wildlife Service, Washington, DC 20240; or the Office of Management and Budget, Paperwork Reduction Act Project (1018–0014), Washington, DC 20503.

Dated: March 29, 1990.

Richard N. Smith,

Acting Director.

[FR Doc. 91–9658 Filed 4–24–91; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 672

[Docket No. 901184–1042]

Groundfish of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of closure to directed fishing; request for comments.

SUMMARY: The Regional Director, Alaska Region, NMFS, (Director), is establishing a directed fishing allowance and prohibiting directed fishing for Pacific Ocean perch in the Eastern Regulatory Area of the Gulf of Alaska. This action is necessary to prevent the total allowable catch (TAC) for Pacific Ocean perch in the Eastern Regulatory Area from being exceeded before the end of the fishing year. The intent of this action is to promote optimum use of groundfish while conserving Pacific Ocean perch stocks.

DATES: Effective: 12 noon on April 22, 1991, Alaska local time (A.l.t.), for the remainder of the fishing year. Comments are invited for 15 days following the effective date of this notice.

ADDRESSES: Comments should be mailed to Dale R. Evans, Chief, Fisheries Management Division, National Marine Fisheries Service, P.O. Box 21668, Juneau, Alaska 99802–1668, or be delivered to 9109 Mendenhall Mall Road, Federal Building Annex, suite 6, Juneau, Alaska.

FOR FURTHER INFORMATION CONTACT: Andrew N. Smoker, Resource Management Specialist, NMFS, 907–586–7228.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) governs the groundfish fishery in the exclusive economic zone in the Gulf of Alaska under the Magnuson Fishery Conservation and Management Act. The FMP was prepared by the North Pacific Fishery Management Council and is implemented by regulations appearing at 50 CFR part 611.92 and parts 620 and 672.

In accordance with § 672.20(c)(2), if the Director determines that the amount of a target species category apportioned to a fishery is likely to be reached, the Director may establish a directed fishing allowance for that species or species group. In establishing a directed fishing allowance, the Director shall consider the amount of that target species of species group that will be taken as incidental catch in directed fishing for other species in the same regulatory area or district. If the Director establishes a directed fishing allowance and that allowance is or will be reached, he will prohibit directed fishing for that species or species group in the specified regulatory area or district.

The amount of a species or species group apportioned to a fishery is TAC, as defined in § 672.20(c)(1). The 1991 TAC for Pacific Ocean perch in the Eastern Regulatory Area of the Gulf of Alaska is 2,378 metric tons (mt) (56 FR 8723; March 1, 1991). The Director has determined that remaining Pacific Ocean perch are necessary as bycatch in other anticipated groundfish fisheries in the Eastern Regulatory Area. Therefore, the Director establishes a directed fishing allowance of 1,378 mt for Pacific Ocean perch in the Eastern Regulatory Area and prohibits directed fishing for Pacific Ocean perch in that area, effective 12 noon, A.l.t., April 22, 1991.

After 12 noon, A.l.t., April 22, 1991, in accordance with § 672.20(g)(3), amounts of Pacific Ocean perch retained on board vessels in the Eastern Regulatory Area at any time during a trip must be less than 20 percent of the amount of all other fish species retained at the same time by the vessel during the same trip as measured in round weight equivalents. This closure will remain in effect for the remainder of the fishing year.

Classification

This action is taken under § 672.20 and is in compliance with Executive Order 12291.

Immediate effectiveness of this notice is necessary to prevent wastage of groundfish that will occur if TACs are exceeded and retention of Pacific Ocean perch is prohibited. Therefore, the Assistant Administrator for Fisheries, NOAA, finds for good cause that it is impractical and contrary to the public interest to provide prior notice and comment on this notice or to delay its effective date. However, interested persons are invited to submit comments in writing to the address above for 15 days after the effective date of this notice.

List of Subjects in 50 CFR Part 672

Fish, fisheries, reporting and recordkeeping requirements.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 22, 1991.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 91-9801 Filed 4-22-91; 2:49 pm]

BILLING CODE 3510-22-M

50 CFR Part 675

[Docket No. 901199-1021]

Groundfish of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of closure to directed fishing in the Bering Sea subarea.

SUMMARY: The Director, Alaska Region, NMFS (Director), has determined that the second quarter primary apportionment of Pacific halibut for the "Domestic Annual Processing (DAP) other fishery" will soon be reached. The Secretary of Commerce (Secretary) is prohibiting directed fishing for pollock and Pacific cod, in the aggregate, by vessels using non-pelagic trawl gear in Zones 1 and 2H of the Bering Sea subarea from 12:00 noon, Alaska local time (A.l.t.), April 22, 1991, through 24:00, A.l.t., June 30, 1991. This action is necessary to prevent the second quarter primary apportionment of halibut to the "DAP other fishery" from being exceeded before the end of the second quarter. The intent of this action is to ensure optimum use of groundfish while conserving Pacific halibut stocks.

DATES: Effective: 12:00 noon, A.l.t., April 22, 1991, through 24:00, A.l.t., June 30, 1991.

FOR FURTHER INFORMATION CONTACT: Andrew N. Smoker, Resource Management Specialist, NMFS, 907-586-7228.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for the Groundfish Fishery in the Bering Sea and Aleutian Islands (FMP) governs the groundfish fishery in the exclusive economic zone within the Bering Sea and Aleutian Islands Management Area (BSAI) under the Magnuson Fishery Conservation and Management Act. The FMP was prepared by the North Pacific Fishery Management Council and was implemented by regulations appearing at 50 CFR part 611.93 and parts 620 and 675.

Amendment 16 to the FMP (56 FR 2700, January 24, 1991) established PSC limits of red king crab and *C. bairdi* Tanner crab in specific zones of the Bering Sea subarea, and for Pacific halibut throughout the BSAI area. Under § 675.21(a)(4), the primary prohibited species catch (PSC) limit of Pacific halibut while conducting any trawl fishery for groundfish in the BSAI during any fishing year is 4,400 metric tons (mt). Further, § 675.21(b)(1) provides that the PSC limit of Pacific halibut be apportioned into bycatch allowances, one of which is assigned to the "DAP other fishery." Within the "DAP other fishery," the Pacific halibut bycatch allowance is allocated on a seasonal basis. The final notice of initial specifications of groundfish for the BSAI for 1991 (56 FR 6290; February 15, 1991) established the 1991 primary Pacific halibut allowance for the "DAP other fishery" at 2,667 mt, and the second quarter seasonal apportionment of that allowance at 1,067 mt.

Under § 675.21(c)(2)(iii), if the Director determines that U.S. fishing vessels using trawl gear will catch the seasonal apportionment of the primary PSC allowance of Pacific halibut in the BSAI while participating in the "DAP other fishery," the Secretary will publish a notice in the **Federal Register** closing Zones 1 and 2H for the remainder of the season to DAP trawl vessels using other than pelagic trawl gear in the combined directed fishery for pollock and Pacific cod.

The Director has determined that the second quarter apportionment of the primary PSC allowance of Pacific Halibut for the "DAP other fishery" will be reached on April 22, 1991. The Secretary is prohibiting directed fishing for pollock and Pacific cod in the aggregate by DAP vessels using trawl gear other than pelagic trawl gear in Zones 1 and 2H of the Bering Sea subarea from 12:00 noon, A.l.t., April 22, 1991, through 24:00, A.l.t., June 30, 1991. In accordance with § 675.21(c)(2)(iii), after this closure, the aggregate of pollock and Pacific cod must comprise less than 20 percent of the aggregate amount of the other groundfish or groundfish products retained by the vessel during a weekly reporting period.

Classification

This action is taken under § 675.21 and complies with Executive Order 12291.

List of Subjects in 50 CFR Part 675

Fish, Fisheries, Recordkeeping and reporting requirements.

Authority: 16 U.S.C. 1801 et seq.

Dated: April 22, 1991.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 91-9802 Filed 4-22-91; 2:49 pm]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 56, No. 80
Thursday, April 25, 1991

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Chapter I

[Summary Notice No. PR-91-9]

Petition for Rulemaking; Summary of Petitions Received; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for rulemaking received; correction.

SUMMARY: This action makes a correction to the Notice of summaries of petitions for rulemaking published on April 11, 1991 (56 FR 14660). The petitioner in the matter of Docket No. 26410 is Mr. Paul Poberezny not the Experimental Aircraft association as published.

DATES: Comments on the petition must be received on or before June 10, 1991.

FOR FURTHER INFORMATION CONTACT: Ida Klepper, Office of Rulemaking (ARM-1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-9688.

SUPPLEMENTARY INFORMATION:

Petition for Rulemaking

Docket No.: 26410.
Petitioner: Mr. Paul Poberezny.
Regulations Affected: 14 CFR Sec. 21.17 and 21.21.
Description of Petition: To allow an applicant for a Normal Category Type Certificate for an airplane not more than 2-place, with fixed landing gear, and a single reciprocating engine to elect FAA's Civil Air Regulation (CAR) 3 as the certification basis.
Petitioner's Reason for the Request: The petitioner believes there is a need for an airplane of relatively simple design and low cost to replace the rapidly dwindling fleet of primary training airplanes currently available to flying schools, as well as to keep grass-roots aviation alive by making available a normal category airplane within the financial reach of those whose interest is only in recreational flying. Airplanes that would be designed and produced under regulations adopted as a result of this petition would have neither the numerous operating restrictions of FAR part 103, Ultralight Vehicles, nor would they be subject to the restrictions proposed for Primary Category aircraft.

Issued in Washington, DC, on April 18, 1991.

Denise Donohue Hall,
Manager, Program Management Staff, Office of the Chief Counsel.

[FR Doc. 91-9762 Filed 4-24-91; 8:45 am]
BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 91-ASW-07]

Airworthiness Directives; Sikorsky Aircraft Model S-76A Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to supersede an existing AD applicable to all Sikorsky Aircraft Model S-76A helicopters, which presently requires repetitive inspections of the vertical pylon to detect cracking in the forward spar components. This proposed new AD would limit these inspections to only those helicopters which have not had the forward spar reinforced with steel straps and a one-piece doubler. The intended effect of the proposal is to relieve a restriction for those operators that have installed the optional modification and for which continuing inspections are no longer necessary.

DATES: Comments must be received on or before June 10, 1991.

ADDRESSES: Comments on the proposal may be mailed in duplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, Attn: Rules Docket No. 91-ASW-07, 4400 Blue Mound Road, Forth Worth, Texas 76193-0007, or delivered in duplicate to room 158, Bldg. 3B, at the above address. Comments must be marked: Docket No. 91-ASW-07. Comments may be inspected at the above location in room 158, Bldg. 3B, between the hours of 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

The applicable service bulletins may be obtained from: Sikorsky Aircraft, 600 Main Street, Stratford, Connecticut 06601-1381, or may be examined in the Rule Docket.

FOR FURTHER INFORMATION CONTACT: Richard B. Noll, Boston Aircraft Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, FAA, 12 New England Executive Park, Burlington, Massachusetts 01803, telephone (617) 273-7111.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate o the address specified above. All communications received on or before the closing date for comments will be considered by the FAA before any final action is taken on the proposed rule. The proposal contained in this notice may be changed in light of comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Office of the Assistant Chief Counsel, for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of the proposed AD, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the the following statement is made: Comments to Docket Number 91-ASW-07. The postcard will be date/time stamped and returned to the commenter.

After issuing AD 83-17-07, Amendment 39-4711 (48 FR 39052, August 29, 1983), as amended by Amendment 39-5017 (50 FR 15099, April 17, 1985), and Amendment 39-5332 (51 FR 24134, July 2, 1986), which currently requires a repetitive inspection for cracks in the vertical pylon forward spar caps and web on all Sikorsky S-76A helicopters, the FAA has determined that a modification designed by the manufacturer to add steel straps to the

forward spar caps and a one-piece doubler to the forward spar web provides a level of safety in which repetitive inspections are no longer necessary. Therefore, the FAA is proposing to supersede AD 83-17-07 by changing the applicability statement to exclude any Sikorsky S-76A rotorcraft that have this modification installed.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this proposed regulation is relieving in nature and imposes no additional cost to any person. Therefore, I certify that this action: (1) Is not a "major rule" under Executive order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal: and (4) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air Transportation, Aircraft, Aviation safety, and Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration (FAA) proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—[Amended]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by superseding Amendment 39-4711 (48 FR 39052, August 29, 1983), AD 83-17-07, as amended by Amendment 39-5017 (50 FR 15099, April 17, 1985) and Amendment 39-5332 (51 FR 24134, July 2, 1986) with the following new AD:

Sikorsky Aircraft: Docket Number 91-ASW-07.

Applicability: All Sikorsky Aircraft Model S-76A helicopters, certificated in any category, equipped with forward spar cap angles, part numbers (P/N's) 76201-05001-103 and 76201-05001-104, forward spar web, P/N 76201-05001-101, and forward spar web doubler, P/N 76201-05001-107, and not equipped with Modification Kit 76070-20086 installed in accordance with Sikorsky Alert Service Bulletin No. 76-55-12, dated June 6, 1986.

Compliance: Required as indicated, unless already accomplished.

To prevent failure of the helicopter vertical pylon forward spar cap, web, and web doubler, accomplish the following:

(a) For helicopters that have attained 100 or more hours' time in service, comply with paragraph (c) within the next 25 hours' time in service after the effective date of this AD unless already accomplished within the last 25 hours' time in service, and thereafter at intervals not to exceed 50 hours' time in service from the last inspection.

(b) For helicopters that have not attained 100 hours' time in service on the effective date of this AD, comply with paragraph (c) before attaining 125 hours' time in service, and thereafter at intervals not to exceed 50 hours' time in service.

(c) Inspect for cracks in the forward spar cap angles, spar web, and web doubler and in repairs and reinforcements in the area of the tail rotor shaft cutout in the pylon forward spar and areas adjacent to the fuselage shear deck as follows:

(1) Remove the tail rotor drive shaft fairings in the vicinity of the vertical pylon, exposing the shear deck and vertical pylon forward spar.

(2) Clean all accessible areas around the tail rotor drive shaft cutout area in the vertical pylon forward spar using a clean cloth dampened with solvent P-D-680, Type II, or FAA-approved equivalent.

(3) Using a light, visually inspect the forward side of the spar for cracks in all areas adjacent to the shear deck attachment to the forward spar web and the web doubler.

(4) Using a light and mirror, visually inspect the aft side of the spar for cracks. Inspect through the tail rotor drive shaft cutout.

(5) If cracks are found in the spar web or spar web doubler or in their repair or reinforcement parts, accomplish the following:

(i) For each part, if multiple cracks are found or if a single crack equal to or in excess of 2½ inches in length is found, replace cracked parts prior to further flight with new parts of the same part number; or if not previously repaired or reinforced, incorporate a repair procedure contained in Sikorsky Overhaul and Repair Instructions (O&RI) 76200-014B, or later FAA-approved revisions, or an equivalent procedure approved as noted in paragraph (d) of this AD.

(ii) If a single crack is less than 2½ inches in length, visually inspect the part for crack length prior to the first flight of each day, and—

(A) Within 25 hours' time in service after finding a crack, replace or repair the part in accordance with paragraph (c)(5)(i), except

(B) Replace or repair the affected part in accordance with paragraph (c)(5)(i) before further flight, whenever the crack length reaches 2½ inches.

(6) If a crack is found in the spar cap angles, replace the cracked spar cap angles prior to further flight with a new spar cap angle of the same part number in accordance with Sikorsky Maintenance Manual SA 4047-76-2, or approved equivalent procedures as noted in paragraph (d) of this AD.

(7) Reinstall the tail rotor drive shaft fairings after the inspections and rework, as necessary, of paragraphs (c)(1) through (c)(6) are completed.

(d) Alternate inspections, repairs, modifications, or other means of compliance which provide an equivalent level of safety, may be used if approved by the Manager, Boston Aircraft Certification Branch, FAA, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803.

(e) On request of an operator, an FAA maintenance inspector, subject to prior approval of the Manager, Boston Aircraft Certification Branch, may extend the repetitive inspection interval specified in this AD if the request contains justifying data.

This AD proposes to supersede Amendment 39-4711 (48 FR 39052, August 29, 1983), AD 83-17-07, as amended by Amendment 39-5017 (50 FR 15099, April 17, 1985), AD 83-17-07R1, and by Amendment 39-5332 (51 FR 24134, July 2, 1986), AD 83-17-07R2.

Issued in Fort Worth, Texas, on April 5, 1991.

James D. Erickson,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 91-9757 Filed 4-24-91; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

RIN 1545-AJ67

Arbitrage Restrictions on Tax Exempt Bonds

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the rules and regulations portion of this issue of the **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to arbitrage restrictions applicable to tax exempt bonds issued by state and local governments under section 103 of the Internal Revenue Code. The text of the temporary regulations also serves as the comment document for this notice of proposed rulemaking.

DATES: Written comments and requests for a public hearings must be received by June 24, 1991.

ADDRESSES: Send comments and requests for a public hearing to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R (FI–91–86), room 4429, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: William P. Cejudo, 202–566–3283 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations published in the rules and regulations portion of this issue of the Federal Register simplify, clarify, and expand certain provisions of the temporary and proposed regulations §§ 1.148–0T through 1.148–9T and § 1.149(d)–1T, which were promulgated with respect to sections 103, 148, and 149 of the Code. Additionally, the temporary regulations modify the definitions of "gross proceeds" and "investment proceeds" that are applicable for purposes of arbitrage yield restrictions. Finally, the temporary regulations provide that a certain transaction is prohibited as an abusive transaction involving an advance refunding bond. The text of the new temporary regulations serves as a comment document for this notice of proposed rulemaking.

For the text of the temporary regulations see T.D. 8345 published in the rules and regulations portion of this issue of the Federal Register.

Special Analyses

It has been determined that these proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and therefore, an initial Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for a Public Hearing

Before the adoption of these proposed regulations, consideration will be given to any written comments that are submitted (preferably a signed original and eight copies) to the Internal Revenue Service. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Internal Revenue Service by any person who also submits written comments. If a public hearing is held, notice of the time, place, and data will be published in the Federal Register.

Drafting Information

The principal authors of these proposed regulations are David A. Walton, Office of Tax Legislative Counsel, Department of the Treasury, and John J. Cross III, Office of Assistant Chief Counsel (Financial Institutions & Products), Internal Revenue Service. However, other personnel from the Service and Treasury Department participated in their development.

List of Subjects in 26 CFR 1.61–1.281–4

Deductions, Exemptions, Income taxes, Reporting and recordkeeping requirements, Taxable income.

Proposed Amendments to the Regulations

The temporary regulations, T.D. 8345, published in the Rules and Regulations portion of this issue of the Federal Register, are hereby also proposed as final regulations under sections 103, 148, and 149 of the Internal Revenue Code.

Fred T. Goldberg,

Commissioner of Internal Revenue.

[FR Doc. 91–9560 Filed 4–19–91; 3:22 pm]

BILLING CODE 4830–01–M

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26 CFR Part 1

RIN 1545–A037

Proceeds of Bonds Used for Reimbursement

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of Proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that clarify when the allocation of bond proceeds to reimburse expenditures previously made by an issuer is treated as an expenditure of the bond proceeds. These regulations do not apply to a bond issue unless proceeds of the issue are used to reimburse expenditures paid before the date of issue of the bonds. When bond proceeds are "spent," they are no longer subject to arbitrage rebate, arbitrage yield limitations, and certain other limitations. Changes to the applicable law were made by the Tax Reform Act of 1984 and the Tax Reform Act of 1986.

DATES: Written comments must be received by July 15, 1991. Requests to speak (with outlines of oral comments) at a public hearing scheduled for August 8, 1991, at 10 a.m. must be received by July 24, 1991.

ADDRESSES: Send comments, requests to appear at the public hearing, and outlines of comments to be presented to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R (FI–59–89), Room 4429, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the regulation, William P. Cejudo, 202–566–3283 (not a toll-free number). Concerning the hearing, Robert Boyer of the Regulations Unit, 202–566–3935 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer T:FP, Washington, DC 20224.

The collection of information in this regulation is in proposed §§ 1.103–17 (c) and (e). This information is required by the Internal Revenue Service pursuant to section 103. This information will be used to verify that a tax exempt bond issuer is properly allocating bond proceeds for reimbursement purposes. The taxpayers affected are states and political subdivisions that issue bonds, entities that issue bonds on behalf of states or polticial subdivisions, and certain section 501(c)(3) organizations.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual recordkeepers may require greater or less time, depending on their particular circumstances.

Estimated total annual recordkeeping burden: 6000 hours.

The estimated average annual burden per recordkeeper is 2.4 hours.

Estimated number of recordkeepers: 2500.

Background

This document amends the Income Tax Regulations (26 CFR part 1) to provide proposed rules regarding when the use of bond proceeds to reimburse a previously paid expenditure is treated as an expenditure of the bond proceeds for purposes of sections 103 and 141–150 of the Internal Revenue Code. The proposed regulations reflect the modifications to section 103 and the addition of sections 141–150 to the Code by the Tax Reform Act of 1986 (Pub. L. 99–514, 100 Stat. 2602).

Explanation of Provisions

A. Scope of the Regulations

These proposed regulations provide rules for "reimbursement bonds." Reimbursement bonds are bonds the proceeds of which are allocated to reimburse expenditures paid prior to the date of issue of the bonds. If no bond proceeds are allocated to reimburse such prior expenditures, these proposed regulations do not apply to the allocation.

B. General Reason for the Regulations.

Proceeds of a bond generally cease to be treated as proceeds on the date they are spent. Moneys that cease to be treated as proceeds of a bond are no longer subject to arbitrage yield limitations, the arbitrage rebate requirement, and certain other restrictions imposed by sections 103 and 141–150 of the Code. Therefore, spending bond proceeds as soon as possible may reduce the amount of arbitrage rebate an issuer would otherwise pay and may free the issuer from complying with other significant requirements of the Code.

The early expenditure of bond proceeds as a means of avoiding or minimizing the amount of arbitrage rebate due the United States is encouraged by section 148(f)(4) of the Code, which generally treats an obligation as complying with the arbitrage rebate requirement if all gross proceeds of the obligation are spent within 6 months of the date of issue of the obligation (subject to certain exceptions) or in prescribed installments over a 2-year period (subject to certain exceptions and other requirements). Encouraging the early expenditure of bond proceeds furthers federal tax policy by discouraging the issuance of bonds earlier than the bond proceeds are needed for governmental purposes. Deferring bond issuances reduces opportunities for earning arbitrage and lessens the burden on financial markets.

Because the applicability of many restrictions and requirements imposed by the Code ceases when bond proceeds are spent, proper administration of sections 103 and 141–150 requires a definition of what constitutes an expendture of bond proceeds. In particular, it is important to define to what extent the allocation of bond proceeds to reimburse prior expenditures is considered an expenditure of the proceeds.

These proposed regulations describe the cirumcumstances in which it is appropriate to allow an allocation of bond proceeds to reimburse a prior expenditure to be treated as an expenditure of bond proceeds on the date of allocation. If reimbursements were not limited to a reasonable period of time prior to issuance of bonds, issuers could generally avoid compliance with sections 103 and 141–150 by simply allocating bond proceeds to capital expenditures paid long before issuance of the bonds and without reliance on the bond issue. The intent of these proposed regulations is to limit the treatment of reimbursement allocations as expenditures of bond proceeds to situations in which economic circumstances justify the reimbursement. These regulations are not intended to permit or condone the use of reimbursment allocations to avoid arbitrage yield limitations, arbitrage rebate, or other tax limitations or restrictions.

C. General Rule

An allocation of proceeds of a non-private-activity bond or a qualified 501(c)(3) bond to a previously paid expenditure must comply with new § 1.103–17 to be an expenditure of bond proceeds. Similarly, new § 1.103–18 provides rules concerning the allocation of proceeds of exempt facility bonds and qualified small issue bonds to previously paid expenditures. If a bond meets the requirements of these regulations, bond proceeds are deemed to be spent when they are allocated to reimburse a prior expenditure.

Under limited circumstances, the Commissioner may rule that, although a reimbursement allocation does not meet the requirements of § 1.103–17 or § 1.103–18, an allocation may nevertheless be treated as an expenditure of bond proceeds. It is anticipated, however, that those rulings will be limited to unusual situations not contemplated by these regulations.

There are four general requirements that must all be met in order for a reimbursement to qualify as an expenditure of bond proceeds:

(1) The issuer (which, as defined, includes the borrower from a conduit issuer) must declare a reasonable official intent to reimburse the expenditure (the "official intent requirement").

(2) Subject to a special exception for certain unexpected or preliminary expenditures, the official intent must be declared during the 2-year period ending on the date the expenditure is paid (the "official intent period requirement").

(3) Subject to a special exception for certain preliminary expenditures, the allocation of reimbursement bond proceeds to an expenditure must take place by a required time (the "reimbursement period requirement"). The allocation must generally occur on or before the later of the date 1 year after that expenditure was paid or the date 1 year after the property was placed in service. Allocation may not occur before the date of the expenditure.

(4) The reimbursed expenditure is incurred solely to acquire, construct, or rehabilitate property having a reasonably expected economic life of at least one year (the "economic life requirement").

D. Official Intent Requirement

The purposes of the official intent requirement are to provide evidence that, on or prior to the date of payment, the issuer intended to reimburse the expenditure, and to assure that the reimbursement is not a device to avoid requirements imposed by the Code with respect to tax exempt bonds. In order to ensure that an issuer will consider its current financial and budgetary circumstances in connection with any declaration of official intent and that the reimbursement will be consistent with the issuer's financial and budgetary circumstances, the regulation contains requirements that (1) official intent be declared within the 2-year period ending on the date of payment of the expenditure, (2) the property to which the reimbursement relates be adequately described in the declaration of official intent, and (3) the declaration of official intent identify the reasonably expected sources of funds that will be used to pay the reimbursement expenditure and the reimbursement bonds.

Generally, the procedural requirement can be satisfied by any official expression such as a resolution, ordinance, public notice, or other public document that is usually treated by the issuer as representing an official action or declaration by or on behalf of the issuer. The document containing the declaration of official intent must be available for inspection by the general public. Special rules apply to public availability of declarations of official

intent with respect to qualified 501(c)(3) bonds and other private activity bonds. Given the flexibility in the rules governing the manner in which official intent may be declared, the public availability requirement is intended to insure that such declarations are available for public scrutiny on generally the same basis as other official actions of the issuer such as public laws, ordinances, and similar actions.

A declaration of official intent must be reasonable. The reasonableness requirement is intended to curb abuses that may otherwise arise when bond proceeds are allocated to reimburse expenditures primarily for the purpose of avoiding tax restrictions or requirements. The reasonableness standard does not impose a requirement on an issuer that all other funds be exhausted. Instead, the standard is intended to ensure that reimbursement of an expenditure is motivated by an intent to finance on a long-term basis an expenditure originally paid with moneys that were not intended to be available to fund the expenditure on a long-term basis.

The reasonableness standard is also not intended to prevent an issuer from avoiding or minimizing arbitrage rebate or arbitrage yield limitations by purposely delaying the issuance of a bond. An issuer may, for example, pay expenditures with respect to a project prior to issuance of the bond with moneys that are not available on a long-term basis to finance the project. By delaying the bond issue, the issuer is able to reimburse itself for the prior expenditures with bond proceeds that will be spent within the relevant 6-month or 2-year time period, thereby meeting an exception to arbitrage rebate. Delaying the issuance of obligations for this purpose furthers federal tax policy and is encouraged.

The reasonableness standard will not be applied to question the soundness or appropriateness of an issuer's budget or financial practices; rather it is meant to ensure that any intent to reimburse is consistent with an issuer's established budgetary and financial practices (provided that those practices are not adopted primarily for tax avoidance purposes). In order to ensure that an issuer's actions reasonably conform to the issuer's declarations of official intent, the reasonableness standard requires that the issuer consistently reimburse, with proceeds of a borrowing, expenditures which are actually paid and for which official intent is declared. Thus, an issuer must not have developed a pattern of failing to reimburse those expenditures. An issuer is presumed not to have developed a pattern of failing to reimburse expenditures which are actually paid and for which it has declared official intent if, during the three-year period preceding the issuance of the reimbursement bonds, the issuer reimbursed with proceeds of a borrowing (taxable or tax exempt) at least 75 percent of the expenditures which were actually paid and for which official intent was declared.

E. Reimbursement Period Requirement

The purpose of the reimbursement period requirement is to provide further assurance that the money originally used to pay for the expenditure that is to be reimbursed is not available with respect to the expenditure on a long-term basis. If an expenditure is not reimbursed within a relatively short period of time after its payment or after completion of the project, it is more likely that the money used to pay the expenditure is available with respect to that expenditure on a long-term basis.

F. Economic Life Requirement

The purpose of the economic life requirement is to prohibit the reimbursement of day-to-day operating costs and similar "working capital" items. For purposes of this requirement, the economic life of property is determined in the same manner as that for property financed with bonds subject to the 120-percent-of-economic-life limitation contained in section 147(b)(3), except that the determination of the economic life of the property is made as of the earlier of the date the reimbursement bonds are issued or the date the property is placed in service.

G. Special Exception for Qualified Preliminary Expenditures

Preliminary expenditures such as architectural, engineering, survey, and similar costs (not exceeding in the aggregate 10 percent of the expected cost of the project) generally are not subject to the official intent period requirement. Preliminary expenditures may be incurred and paid after the expiration of the 2-year official intent period. For example, assume an issuer declares official intent on June 3, 1991, to reimburse preliminary expenditures incurred with respect to a large construction project. Also assume that the issuer pays preliminary expenditures for planning and designing the project over a 5-year period ending on June 3, 1996. Were it not for this exception, the issuer would be required to adopt another declaration of official intent with respect to preliminary expenditures paid after June 3, 1993 (the expiration date of the official intent period), in order to comply with the official intent period requirement. Since the expenditures are preliminary expenditures, however, the official intent declared on June 3, 1991, remains valid for the post June 3, 1993, preliminary expenditures. This exception also recognizes that projects for which preliminary expenditures have been incurred may be abandoned, and it generally permits reimbursement of the preliminary expenditures in this event.

H. Definition of Issuer

For purposes of these regulations, the term "issuer" means the actual issuer of an obligation and any entity that is a member of the same controlled group of entities as the actual issuer. If the proceeds of a bond are loaned by the issuer to an entity (the "conduit borrower") that uses the bond proceeds to reimburse a prior expenditure, the term "issuer" includes the conduit borrower and any entity that is a member of the same controlled group of entities as the conduit borrower. The actual issuer of the reimbursement bonds is not treated as the issuer with respect to proceeds loaned to a conduit borrower unless the actual issuer is also a member of the same controlled group of entities as the conduit borrower.

A controlled group of entities is a group of entities controlled by the same entity or entities. The purposes of this provision are to allow any member of the controlled group and not just the issuer to comply with the regulation and to prevent the restrictions contained in the regulation from being circumvented by the use of entities other than the actual issuer that are controlled directly or indirectly by the actual issuer.

I. Reimbursement With Proceeds of Private Activity Bonds

Proceeds of a private activity bond (other than a qualified 501(c)(3) bond) that are allocated to reimburse a previously paid expenditure of the issuer qualify as an expenditure of the bond proceeds if the bond complies with the requirements of § 1.103–8(a)(5) and does not violate the anti-abuse rule of § 1.103–17(k). If proceeds of a private activity bond are used to finance a facility that, for purposes of section 142(b)(1) of the Code, is treated as owned by a governmental unit, the reimbursement bond must comply with the requirements of § 1.103–17 in addition to complying with the provisions of § 1.103–8(a)(5).

J. Anti-abuse Rule and Limitation on Scope of Reimbursement Regulations

An anti-abuse rule provides that these regulations generally do not apply to treat a reimbursement allocation as an expenditure of bond proceeds if, absent that application, the bond proceeds are otherwise used directly or indirectly for one of the following prohibited uses: (1) To refund another issue of tax exempt governmental obligations within the meaning of section 148 of the Code, (2) to create or increase the balance in a "sinking fund" within the meaning of § 1.103–13(g), with respect to any tax exempt obligation of the issuer, or to replace funds that have been, are, or will be so used for sinking fund purposes, (3) to create or increase the balance in a "reserve or replacement fund" within the meaning of § 1.103–14(d), with respect to any tax exempt obligation of the issuer, or to replace funds that have been, are, or will be so used for reserve or replacement funds purposes, or (4) to reimburse any expenditure or any payment with respect to financing of an expenditure that was originally paid with proceeds of any tax exempt obligation of the issuer to any person or entity other than the issuer (e.g., interfund borrowing) or any member of the same controlled group as the issuer. The purpose of this anti-abuse rule is to prohibit issuers from using a reimbursement allocation to earn arbitrage that would otherwise be prohibited in certain transactions involving refundings, sinking funds and reserve and replacement funds, and previously-financed expenditures.

There are two exceptions to the anti-abuse rule. Under the first exception, the anti-abuse rule does not apply if the issuer deposits the moneys from the reimbursement allocation in a bona fide debt service fund within the meaning of § 1.103–13(b)(12) or otherwise uses these moneys to pay current debt service on any obligation of the issuer (other than the reimbursement bonds). Under the second exception, the prohibitions in the anti-abuse rule with respect to refundings and expenditures originally paid with proceeds of a borrowing do not apply if the financing proceeds originally used to pay the expenditures were not reasonably expected to be used to finance that expenditure.

Effective Date

Except as provided in § 1.103–17(l)(2) and § 1.103–18(d)(2), these regulations are proposed to be effective for bonds issued after September 7, 1991 (30 days after a public hearing with respect to these proposed regulations is held).

Special Analyses

It has been determined that these proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulatons, and, therefore, an initial Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submited to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before the adoption of these proposed regulations, consideration will be given to any written comments that are submited (preferably a signed original and eight copies) to the Internal Revenue Service. All comments will be available for public inspection and copying.

A public hearing will be held Thursday, August 8, 1991, at 10 a.m. in Room 2615, Internal Revenue Builing, 1111 Constitution Avenue, NW., Washington, DC. The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR part 601) shall apply with respect to the public hearing.

Persons who have submitted written comments by July 15, 1991, and who also desire to present oral comments at the hearing on the proposed regulations should submit, not later than July 24, 1991, an outline of the oral comments to be presented at the hearing and the time they wish to devote to each subject.

Each speaker (or group of speakers representing a single entity) will be limited to 10 minutes for an oral presentation exclusive of the time consumed by the questions from the panel for the government and answers thereto.

Because of controlled access restrictions, attendees cannot be admitted beyond the lobby of the Internal Revenue Building before 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the persons testifying. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is David A. Walton, Office of Tax Legislative Counsel, Department of the Treasury, and formerly of the Office of Assistant Chief Counsel (Financial Institutions and Products), Internal Revenue Service. However, other personnel from the Service and Treasury Department participated in their development.

List of Subjects in 26 CFR 1.101–1–1.133–1T

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES: TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 continues to read in part:

Authority: 26 U.S.C. 7805 * * *

Par. 2. The following new § 1.103–17 is added to read as follows:

§ 1.103–17 Proceeds of non-private activity bonds and qualified 501(c)(3) bonds used for reimbursement

(a) *Table of contents.* The contents of this section are as follows:

(2) Example.
(i) Special exception for qualified preliminary expenditures and abandonment prior to completion.
(1) Suspension of the official intent period requirement.
(2) Special rule for abandonment prior to completion.
(3) Definition of preliminary expenditures.
(j) Definition of issuer.
(1) General rule.
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(1) In general.
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(b) *Scope of application.* This section applies only to any reimbursement bond (as defined in paragraph (d)(1) of this section) that is not a private activity bond described in section 141(a) or that is a qualified 501(c)(3) bond described in section 145. In addition, to the extent provided in § 1.103–18(a) and (b), this section applies to a reimbursement bond that is a private activity bond.

(c) *Operating rules for expenditures of reimbursement bond proceeds.* Except as provided in paragraphs (h) (relating to certain unforeseeable expenditures), (i) (relating to certain preliminary expenditures), and (k) (relating to an anti-abuse rule) of this section, for purposes of applying sections 103 and 141–150, a reimbursement allocation (as defined in paragraph (d)(2) of this section) is treated as an expenditure of proceeds of the reimbursement bond (as defined in paragraph (d)(1) of this section) on the date of the reimbursement allocation if each of the requirements enumerated in this paragraph (c) is met.

(1) *Official intent requirement.* The issuer declares a reasonable intention to reimburse the expenditure with proceeds of a borrowing.

(2) *Official intent period requirement.* The declaration of official intent required in paragraph (c)(1) of this section occurs within the 2-year period ending on the date that the expenditure to be reimbursed was paid by the issuer.

(3) *Reimbursement period requirement.* The reimbursement allocation occurs not earlier than the date on which the expenditure is paid and not later than the later of—

(i) The date that is 1 year after the date on which the expenditure was paid, or

(ii) The date that is 1 year after the date on which the property was placed in service (within the meaning of § 103–8(a)(5)(ii)).

(4) *Economic life requirement.* The expenditure to be reimbursed is incurred with respect to property having a reasonably expected economic life of at least 1 year.

(d) *Definitions of reimbursement bond and reimbursement allocation*—(1) *Definition of reimbursement bond.* For purposes of this section, the term "reimbursement bond" means that portion of an issue the proceeds of which are allocated to reimburse an expenditure that was paid prior to the date of issue of the bond issue. The term "reimbursement bond" does not include, and this regulation does not apply to, that portion of an issue the proceeds of which are allocated to reimburse an expenditure that is paid on or after the date of issue of the bond issue.

(2) *Definition of reimbursement allocation.* For purposes of this section, the term "reimbursement allocation" means an allocation of bond proceeds to pay an expenditure which meets each of the requirements enumerated in this paragraph (d)(2). First, the allocation must be evidenced by an entry on the books or records of the issuer maintained with respect to the bonds. Second, the allocation entry must specifically identify an actual prior expenditure to be reimbursed. Third, the allocation entry must be effective to relieve the allocated bond proceeds covered by the entry from any restrictions under the relevant legal documents and applicable state law that apply only to unspent bond proceeds (other than restrictions relating to the requirements of this section).

(e) *Procedure for declaring official intent*—(1) *Form of official intent.* For purposes of paragraph (c)(1) of this section, an issuer declares an intention to reimburse an expenditure ("official intent") if—

(i) The issuer, or any person or entity authorized by the issuer to declare official intent on behalf of the issuer, states in the publicly available official books, records, or proceedings of the issuer that the issuer intends to reimburse the expenditure with proceeds of a borrowing, and

(ii) The statement contains the other information required by paragraphs (e)(2), 3), and (4) of this section.

(2) *Intention to reimburse.* The official intent must state that the issuer intends to reimburse the expenditure by either incurring debt the interest on which is excludable from gross income under section 103 ("tax exempt debt") or by incurring taxable debt or tax exempt debt. An official intent that states that an issuer only intends to incur debt does not meet the requirements of this paragraph.

(3) *General description of property to which reimbursement relates.* The declaration of official intent must contain a reasonably accurate general functional description of the type and use of the property for which the expenditure to be reimbursed is paid. The general description must provide sufficient information so that a person who is not familiar with the property would generally understand the nature and function of the property. The general description of the property must identify the general character, type, or purpose of the property or project (e.g., "law enforcement equipment," "hospital equipment," "administration building," etc.). The description must also state the anticipated size, quantity, or cost of the property (e.g., "20 police cars" or "law enforcement equipment costing $400,000"; "5 x-ray machines" or "x-ray equipment costing $200,000"; or "50,000-square-foot administration building" or "$1,000,000 administration building"). Insubstantial deviations between the description of the property in the official intent and the actual property acquired, constructed, or rehabilitated do not invalidate an otherwise valid official intent (e.g., actual purchase of 16 police cars and 2 police vans; actual purchase of x-ray equipment costing $212,000; or actual construction of a 60,000-square-foot administration building). For purposes of this paragraph, the term "insubstantial deviations" has the same meaning as in § 5f.103–2(f)(2).

(4) *Identification of source of funds.* The declaration of official intent must identify the reasonably expected source or sources of funds that will be used to pay the reimbursement expenditure and the reasonably expected source of funds to be used to pay debt service on the reimbursement bonds (e.g., project revenues, general tax revenues, special assessments, grants, etc.).

(5) *Public availability of official intent*—(i) *In general.* The books, records, and proceedings in which the official intent is declared must be reasonably available for inspection by the general public and must be maintained or otherwise supervised by the governing body of the issuer or by a person or entity authorized to act on behalf of the issuer.

(ii) *Where.* These books, records, or proceedings must be available for inspection at the main administrative

office of the issuer or at the customary location of records of the issuer that are available to the general public. With respect to qualified 501(c)(3) bonds and other private activity bonds subject to this section, the declaration of official intent must be available for public inspection either at the office of the entity benefitting from the reimbursement bonds or at the office or customary location of records of the governmental entity reasonably expected to issue the reimbursement bonds.

(iii) *When.* The books and records must be continuously available during normal business hours of the issuer on every business day of the period beginning the earlier of 10 days after the official intent is declared or the date of issue of the reimbursement bonds and ending on, and including, the date of issue of the reimbursement bonds.

(6) *Special rule for conduit borrowers.* If, under paragraph (j)(1) of this section, the issuer includes a conduit borrower and not the actual issuer, any of the requirements of this paragraph (e) may be met by either the issuer as so defined or the actual issuer.

(f) *Reasonableness standard for declaring official intent*—(1) *General rule.* A declaration of official intent to reimburse an expenditure is reasonable only if—

(i) It is consistent with the budgetary and financial circumstances of the issuer as of the date the official intent is declared and

(ii) The issuer does not have a pattern of failing to reimburse expenditures for which the official intent was declared and which were actually paid by the issuer other than in circumstances that wer unexpected and beyond its control.

(2) *Consistency with budgetary and financial circumstances and availability of money.* In general, a declaration of official intent is not consistent with an issuer's budgetary and financial circumstances if the issuer intends to reimburse an expenditure for which funds (from sources other than the reimbursement bond issue), at the time of the declaration of official intent, are, or are reasonably expected to be, allocated on a long-term basis, reserved, or otherwise available pursuant to an issuer's budget. If a declaration of official intent would fail to be consistent with an issuer's budgetary or financial circumstances solely on the grounds that the declaration violates the preceding sentence, the declaration is, nevertheless, consistent with those circumstances if the issuer can show bona fide changed circumstances or financial reasons (other than the avoidance of arbitrage rebate, arbitrage yield limitations, or other limitations contained in sections 103 or 141 through 150) for the failure to use allocated or budgeted moneys to fund the expenditure. The determination of whether a declaration of official intent is consistent with an issuer's budgetary or financial circumstances is made without regard to any allocation, budgeting, or restriction of moneys or adoption of a requirement or policy to reimburse a fund of which the primary purpose is to prevent moneys from being deemed to be available to pay an expenditure that the issuer intends to reimburse with proceeds of a borrowing.

(3) *Pattern of failing to reimburse.* Whether an issuer has developed a pattern of failing to reimburse expenditures for which official intent has been declared is determined by all the relevant facts and circumstances concerning the issuer's purposes for, and history of, declaring official intent and reimbursing expenditures. With respect to any reimbursement allocation, an issuer is deemed not to have a pattern of failing to reimburse expenditures for which official intent has been declared if, subject to the modification in paragraph (f)(4) of this section, the issuer has reimbursed with proceeds of a borrowing (taxable or tax exempt) at least 75 percent of the expenditures, if any, which were actually paid by the issuer and for which during the 3-year period immediately preceding the date of issue of the reimbursement bond, the issuer or any person or entity acting on behalf of the issuer declared an official intent that complied with the requirements of paragraphs (c) (1) and (2) of this section (the "75 percent safe harbor"). Unreimbursed expenditures which were actually paid by the issuer and for which official intent was declared are not taken into account for purposes of the 75 percent safe harbor to the extent that the failure to reimburse is due to extraordinary circumstances that were beyond the control of the issuer and that, as of the date of the declaration of official intent, the issuer could not have reasonably expected to occur. Examples of such extraordinary circumstances include unexpected significant increases in interest rates, unexpected reductions in creditworthiness of the issuer, unexpected judicial or legislative impediments that make the financing uneconomic or impractical, unexpected or emergency borrowing for other needs that cause the issuer to reach its borrowing limits, or unexpected significant increases in tax or other revenues (or significant reductions in expected expenditures) that make the reimbursement unnecessary because of the increase in available funds.

(4) *Special rule for unreimbursed expenditures for which the reimbursement period has not expired.* Unreimbursed expenditures which were paid by the issuer and for which the issuer has declared official intent in compliance with paragraph (c) (1) and (2) of this section are not taken into account for purposes of the 75 percent safe harbor if, as of the date of issue of the reimbursement bond, the period described in paragraph (c)(3) of this section has not expired with respect to the expenditure and the issuer reasonably expects to reimburse the expenditure with proceeds of a borrowing within that period. For purposes of the 75 percent safe harbor, only official intents declared by the issuer after September 7, 1991, are taken into account.

(5) *Examples.* The operation of this paragraph (f) is illustrated by the following examples.

Example 1. (i) on June 1, 1993, City *B* adopted a resolution authorizing an expenditure of $250,000 for construction of athletic fields. A portion of the resolution stated that *B* intended to reimburse the expenditure with proceeds of a tax exempt borrowing. The resolution was available for inspection by the general public at city hall (the main administrative office of *B*) at all times after it was adopted. The resolution stated that *B* reasonably expected to use moneys on hand in its general fund to pay for the expenditure and to use a portion of its property tax imposed specifically to pay for the athletic fields to repay the proposed reimbursement bonds. *B* borrowed the $250,000 from moneys in its general fund that *B* had budgeted (prior to June 1, 1993) to be used for salaries during calendar year 1993. *B* did not need the money to pay these salaries until later in the year. *B* had no other moneys budgeted or otherwise reserved to pay the $250,000 expenditure.

(ii) On May 1, 1994, *B* issued $6,000,000 principal amount general obligation, bonds, a portion of the proceeds of which were used to reimburse the $250,000 athletic fields expenditure. During the 3-year period immediately preceding the date of issue of the reimbursement bonds (May 1, 1991, to May 1, 1994) *B* had borrowed to reimburse all the expenditures for which it (or any person or entity acting on its behalf) had declared official intent during the period except for $2,000,000 of expenditures paid by *B* on September 1, 1993, and for which *B* declared official intent to reimburse on August 1, 1993. As of May 1, 1994, *B* reasonably expected to reimburse the $2,000,000 expenditure within the period described in paragraph (c)(3) of this section.

(iii) *B*'s expression of intent to reimburse is reasonable because, on June 1, 1993, it was consistent with *B*'s budgetary and financial circumstances and because, on May 1, 1994, the date of issue of the reimbursement bonds,

B did not have a pattern of failing to reimburse expenditures for which official intent had been declared. Accordingly, *B*'s declaration of intent meets the requirements of paragraph (c)(1) of this section.

Example 2. (i) The facts are the same as in *Example 1* except as stated below. *B* had a capital improvement fund (in addition to its general fund) in the amount of $1,000,000. There was no legal requirement or other policy of *B* to reimburse the capital improvement fund, and *B* had customarily paid for all capital expenditures of $500,000 or less out of its capital improvement fund (although *B* did have a longstanding policy of maintaining at least $100,000 in the capital improvement fund as a base amount for emergency or unexpected needs). Only $100,000 of expenditures other than the athletic fields were budgeted by *B* to be spent out of the capital improvement fund in calendar year 1993, and there were no other limitations placed upon the moneys in the capital improvement fund.

(ii) *B*'s declaration of official intent to reimburse the cost of the athletic fields is not reasonable. The $800,000 in the capital improvement fund ($1,000,000 in the fund less $100,000 of other expenditures less $100,000 base emergency amount) was, or was reasonably expected to be, allocated on a long-term basis to pay the $250,000 expenditure. Thus, financing this expenditure is not consistent with *B*'s budgetary and financial circumstances, and therefore an expression of intent to reimburse this amount is not reasonable. Accordingly, the resolution does not meet the requirements of paragraph (c)(1) of this section.

Example 3. (i) On January 1, 1992, County *C* adopted a 1992 calendar year budget that allocated $5,000,000 to "fire and safety services." Of the $5,000,000 allocated to fire and safety services, the budget took into account $750,000 for "fire equipment and improvements." The budget did not specify the nature of the fire equipment and improvements, and no amount was specifically mentioned for the fire trucks and equipment. However, in submitting its 1992 budget request, the fire department had asked for $750,000 for fire equipment and improvements that consisted of $500,000 for new fire trucks and equipment, $150,000 for new uniforms and protective clothing, and $100,000 to renovate a fire station.

(ii) On June 1, 1992, *C* adopted a resolution authorizing an expenditure of $500,000 for new fire trucks and related fire safety equipment. The resolution stated that *C* intended to reimburse the expenditure with proceeds of a taxable or tax exempt bond. The resolution was available for inspection by the general public at *C*'s main administrative office and stated that *C* reasonably expected to use moneys on deposit in its general fund to pay for the expenditures and to use a portion of its expected sales tax revenues to repay the proposed reimbursement bond.

(iii) As of June 1, 1992 (the date of the declaration of official intent), there was no significant change in circumstances with respect to *C*'s original assumptions concerning revenues or expenditures that were taken into account in arriving at the 1992 budget. On March 11, 1993, *C* issued its $12,000,000 face amount general obligation bonds. As of March 11, 1993, *C* had used proceeds of bonds it had issued to reimburse all the expenditures which *C* had actually made and for which *C* had declared a valid official intent.

(iv) Under these facts, *C*'s declaration of official intent to reimburse the expenditure for the fire equipment is not reasonable, because the expenditure was provided for in *C*'s budget and there were no changes in circumstances justifying a modification of *C*'s original budget allocations. Accordingly, the resolution does not meet the requirements of paragraph (c)(1) of this section.

Example 4. (i) The facts are the same as in *Example 3* except as stated below. Prior to June 1, 1992, $250,000 was spent on fire trucks and equipment as budgeted. As of June 1, 1992, with $500,000 still in the fire equipment and improvements portion of the fire and safety services budget, *C* had not declared official intent with respect to the expenditure of $500,000 for new fire trucks and related equipment. On June 1, 1992, *C* decided to buy fire training equipment worth $500,000 that was not an originally budgeted item and declared official intent in compliance with paragraph (e) of this section to reimburse the $500,000 fire training equipment expenditure. *C* planned on using the $500,000 of reimbursement proceeds for the fire training equipment to pay later that year for the yet-to-be-acquired originally budgeted items (the fire trucks and equipment, the uniforms and protective clothing, and the renovation of the fire station).

(ii) Under these facts, *C*'s declaration of official intent to reimburse the expenditure for the fire training equipment is reasonable because, at the time of the $500,000 expenditure for the training equipment, *C* had not provided for this expenditure in its budget. There was no change in circumstances indicating that any budget moneys would be available on a long-term basis for this expenditure, and reimbursement was consistent with *C*'s budgetary and financial circumstances. Therefore, the resolution meets the requirements of paragraph (c)(1) of this section.

Example 5. (i) The facts are the same as in *Example 4* except as stated below. As of June 1, 1992 (the date of official intent), *C* had decided not to incur the $500,000 of originally budgeted expenditures for the fire trucks and equipment, the uniforms and protective clothing, and the renovation of the fire station. Thus, *C* had no other planned or budgeted uses for the $500,000 budgeted in the fire equipment and improvements portion of the fire and safety services budget. Instead, *C* expected only to acquire the $500,000 of fire training equipment.

(ii) Under these facts *C*'s declaration of official intent to reimburse the fire training equipment expenditure is not reasonable because, at the time of the declaration of official intent, *C* had experienced changed financial circumstances that made current budget moneys available for the previously unbudgeted fire training equipment. Therefore, the resolution does not meet the requirements of paragraph (c)(1) of this section.

Example 6. (i) The facts are the same as in *Example 5* except as stated below. *C* expected to incur $900,000 of expenditures for fire training equipment (for which *C* declared a valid official intent). As in *Example 5*, *C* still had $500,000 in its fire equipment and improvements portion of its fire and safety services budget that was available to pay for a portion of the fire training equipment. The remaining $400,000 cost of the fire training equipment was to be paid for out of *C*'s general fund.

(ii) Under these facts, *C*'s declaration of official intent to reimburse the entire $900,000 cost of the fire training equipment is reasonable to the extent of the $400,000 in excess of the amount available in the fire equipment and improvements portion of the fire and safety services budget as a result of *C*'s changed budgetary and financial circumstances. *C*'s declaration of official intent to reimburse the balance of $500,000 in costs of the fire training equipment is unreasonable because the changed budgetary and financial circumstances of *C* did provide for the additional $500,000 expenditure.

(g) *Determination of reasonably expected economic life.* For purposes of paragraph (c)(4) of this section, the reasonably expected economic life of property is determined in accordance with the provisions of section 147(b)(3), except that the determination is made as of the earlier of the date the reimbursement bonds are issued or the date the property is placed in service by the issuer. An item of property is treated as having the reasonably expected economic life of a facility if the item is incorporated in or becomes part of the facility, is properly chargeable to or may be capitalized as part of the basis of the facility, and, if the issuer were subject to federal income taxation, would be depreciable over the facility's reasonably expected economic life under sections 167 and 168. If property was acquired or constructed with respect to a project that is abandoned but the property would have had a reasonably expected economic life of at least one year if the project had not been abandoned, then, for purposes of paragraph (c)(4) of this section, the property has a reasonably expected economic life of at least one year.

(h) *Exception for official intent declared subsequent to the payment of certain unforeseeable expenditures*—(1) *Extension of time.* If an expenditure was not reasonably foreseeable more than 15 days before its payment, the last day of the official intent period described in paragraph (c)(2) of this section (concerning when intent to reimburse must be expressed) is extended to the date 30 days after the payment was made.

(2) *Example.* The operation of this paragraph (h) is illustrated by the following example.

Example. On June 1, 1992, fire destroyed city *D*'s data processing system. On June 3, 1992, *D* purchased replacement data processing equipment with moneys on deposit in its general operating fund. On June 25, 1992, *D* declared official intent to reimburse the cost of the equipment. Because *D* could not have reasonably foreseen the destruction of the equipment, for purposes of paragraph (c)(2) of this section, the official intent period with respect to the bonds is extended to July 3, 1992, and therefore *D*'s intent was expressed during the required period.

(i) *Special exceptions for qualified preliminary expenditures and abandonment prior to completion*—(1) *Suspension of the official intent period requirement.* The official intent period requirement described in paragraph (c)(2) of this section does not apply to preliminary expenditures, as defined in paragraph (i)(3) of this section. In the case of preliminary expenditures, in lieu of the requirement of paragraph (c)(2) of this section, the declaration of official intent required by paragraph (c)(1) of this section must occur at any time on or before the date that the expenditure to be reimbursed was paid.

(2) *Special rule for abandonment prior to completion.* If a project or facility is abandoned prior to completion, in addition to the relief from the requirements of paragraphs (c)(2) of this section (concerning when official intent must be declared) described in paragraph (i)(1) of this section, the requirement of paragraph (c)(3) of this section (concerning when a reimbursement allocation must occur) also does not apply to preliminary expenditures, as defined in paragraph (i)(3) of this section. In the case of abandonment prior to completion, a reimbursement allocation must be made with respect to a preliminary expenditure no later than the later of—

(i) The date that is 1 year after the date that the project or facility was abandoned, or

(ii) The date 3 years after the last preliminary expenditure was paid.

(3) *Definition of preliminary expenditures.* For purposes of this paragraph, subject to the limitation in the following sentence, the term "preliminary expenditures" includes architectural, engineering, surveying, soil testing, and similar costs that are incurred prior to commencement of construction, rehabilitation, or acquisition of a project but does not include land acquisition, site preparation, and similar costs incident to commencement of construction. Preliminary expenditures may not exceed 10 percent of the expected cost of the project for which the preliminary expenditures were incurred. For purposes of the preceding sentence, the expected cost of the project is determined as of the earlier of—

(i) The date of issue of the reimbursement bonds, or

(ii) The date, if any, on which construction, rehabilitation or acquisition of the project commenced or, if there is no such date, the date of abandonment of the project.

(j) *Definition of issuer*—(1) *General rule.* For purposes of § 1.103–18 and this section, the term "issuer" means the entity that actually issues the reimbursement bond (the "actual issuer") and any entity that is a member of the same controlled group of entities (as defined in paragraph (j)(2) of this section) as the actual issuer. If the proceeds of a reimbursement bond are loaned by the actual issuer to an entity that is not a member of the same controlled group of entities as the actual issuer (a transaction commonly referred to as a "conduit borrowing"), then, for purposes of this section, with respect to those proceeds loaned to the entity, the term "issuer" means the entity to which the actual issuer loaned the bond proceeds (the conduit borrower) and any entity that is a member of the same controlled group of entities as the conduit borrower. In the case of a conduit borrowing, the term "issuer" does not include the actual issuer or any member of the same controlled group of entities as the actual issuer (unless the actual issuer or any member of its controlled group is also a member of the same controlled group as the conduit borrower).

(2) *Controlled group defined.* A controlled group of entities is a group of entities controlled by the same entity or group of entities within the meaning of paragraph (j)(3) or (j)(4) of this section.

(3) *Direct control.* For this purpose, one entity or group of entities (the "controlling entity") controls another entity or group of entities (the "controlled entity") if the controlling entity possesses any of the following rights or powers and the right or power is discretionary and non-ministerial—

(i) The right or power to control all or most of the significant decisions or significant actions of the controlled entity,

(ii) The right or power to select, approve of, disapprove of, or remove without cause a controlling portion of the governing body of the controlled entity,

(iii) The right or power to determine the budget or otherwise significantly control the finances of the controlled entity, or

(iv) The right or power to approve, disapprove, or prevent the issuance of debt obligations by the controlled entity.

(4) *Indirect control.* If a controlling entity controls a controlled entity or entities as a result of possessing one or more of the powers enumerated in paragraphs (j)(3)(i), (ii), and (iii) of this section, then the controlling entity also controls all entities controlled, directly or indirectly, by the controlled entity or entities.

(5) *Examples.* The operation of this provision is demonstrated by the following examples.

Example 1. State law prohibits *G* from issuing bonds unless *F* approves the issue. *F*, however, is required by state law to approve *G*'s bond issues if the bonds meet certain criteria. Neither *F* nor any entity that is part of the same controlled group as *F* has control over the bond approval criteria. *F* possesses a purely ministerial or non-discretionary right or power with respect to *G*.

Example 2. (i) The governing board of sewer authority *H* is appointed by city *I*. Therefore, *H* is controlled by city *I*. *H* incurred expenditures with respect to a facility and declared official intent with respect to the expenditures in compliance with the requirements of paragraphs (c)(1) and (2) of this section. The first expenditure with respect to the facility was paid by *H* on November 12, 1991, and the last expenditure with respect thereto was paid on May 11, 1992. On January 16, 1993, *I* issued bonds, a portion of the proceeds of which were used to reimburse the expenditures made by *H* with respect to the facility. For purposes of paragraph (c)(1) of this section, *I* is deemed to have paid the expenditures paid by *H* and for which *H* was reimbursed.

(ii) For purposes of paragraph (c)(1) of this section, both *H* and *I*, as members of the same controlled group, are treated as the "issuer" with respect to that portion of the reimbursement bond proceeds which were used to reimburse the costs paid by *H* and with respect to which *H* had declared official intent. Since *H* properly declared official intent within the official intent period described in paragraph (c)(2) of this section, that portion of the official intent requirement is satisfied. However, in order for the intent to be reasonable, the budgetary and financial circumstances of both *H* and *I* and any other entity that is a member of the same controlled group as *H* and *I* must be consistent with *H*'s declaration of official intent. For purposes of paragraph (c)(2) of this section, November 12, 1991, is the first day of the official intent period with respect to the first expenditure paid by *H*.

Example 3. City *J* has the legal authority to control all the activities of authority *K* and authority *L*. Therefore, *J*, *K*, and *L* are all part of the same controlled group of entities. *K* declared official intent to reimburse an expenditure that would soon be made by *J* for equipment. *J* used money on deposit in *L*'s operating fund to pay for the equipment.

Pursuant to *L*'s budget, the money spent by *J* on the equipment was budgeted for that expenditure and was not budgeted for other uses. Under these facts, *K*'s declaration of official intent is not reasonable for purposes of paragraph (c)(1) of this section, because it was not consistent with *L*'s budgetary and financial circumstances.

(k) *Anti-abuse rule and limitation on scope of reimbursement regulations*—(1) *General rule.* Except as provided in paragraph (k) (2) or (3) of this section, paragraph (c) of this section does not apply to treat reimbursement bond proceeds as expended if, absent that application, the reimbursement bond proceeds are otherwise used directly or indirectly for one of the following prohibited uses:

(i) to "refund" another issue of tax exempt governmental obligations within the meaning of section 148 of the Code,

(ii) to create or increase the balance in a "sinking fund" within the meaning of § 1.103–13(g), with respect to any tax exempt obligation of the issuer, or to replace funds that have been, are being, or will be so used for sinking fund purposes,

(iii) to create or increase the balance in a "reserve or replacement fund" within the meaning of § 1.103–14(d), with respect to any tax exempt obligation of the issuer, or to replace funds that have been, are being, or will be so used for reserve or replacement fund purposes, or

(iv) to reimburse any expenditure or any payment with respect to financing of an expenditure that was originally paid with proceeds of any tax exempt obligation of the issuer to any person or entity other than the issuer (e.g., an interfund borrowing) or any member of the same controlled group as the issuer.

(2) *Exception for bona fide debt service funds.* Paragraph (k)(1) of this section does not apply (and thus does not create a barrier to the application of paragraph (c) of this section to treat a reimbursement allocation as an expenditure of bond proceeds) if the issuer deposits the moneys from the reimbursement allocation in a bona fide debt service fund (as defined in § 1.103–13(b)(12)) or otherwise uses these moneys to pay current debt service coming due within the next succeeding 1-year period on any tax exempt obligation of the issuer (other than the reimbursement bonds).

(3) *Exception for certain previously financed expenditures.* Paragraphs (k)(1)(i) and (iv) of this section do not apply (and thus do not create a barrier to the application of paragraph (c) of this section) if the proceeds of the financing originally used to pay the expenditure for which a reimbursement allocation is made (the "original financing"), were not reasonably expected by the issuer, as of the date of issue of the original financing, to be used to finance the expenditure.

(4) *Examples.* The operation of paragraph (k)(1) is illustrated by the following examples.

Example 1. M issues reimbursement bonds with a yield of 7 percent per annum and reimburses a previously paid expenditure. *M* uses the reimbursement proceeds to create a sinking fund with respect to outstanding tax exempt bonds that have a yield of 9 percent per annum. As a sinking fund of the outstanding 9 percent bonds, the reimbursement moneys are restricted to a yield of 9 percent per annum. If *M* had issued bonds to advance refund the outstanding 9 percent bonds and the advance refunding bonds had a yield of 7 percent per annum, the refunding escrow created with the proceeds of the advance refunding bonds would be restricted to a yield of 7 percent per annum. Thus, *M*'s use of the reimbursement proceeds is the equivalent of a refunding for purposes of section 148 of the Code and the creation of a sinking fund violates § 1.103–17(k)(1). In addition, this transaction violates the arbitrage yield limitations imposed by section 148(a) of the Code.

Example 2. On April 8, 1992, City *N* borrowed $30,000 from a bank pursuant to a tax exempt loan obligation to buy 2 police cars and purchased the cars on the same day. On September 12, 1992, *N* issued general obligation bonds and proposed to use $30,000 of the bond proceeds to reimburse itself for the police cars. Because the police cars were financed with proceeds of an obligation incurred for the purpose of financing the police cars, the allocation of bond proceeds to reimburse the expenditure for the police cars is not treated as an expenditure of the bond proceeds. Even if the $30,000 bank loan were not outstanding at the time of *N*'s issuance of the general obligation bonds on September 12, 1992, the results of this example would be the same.

Example 3. The facts are the same as in *Example 2* except as stated below. Instead of borrowing $30,000 from the bank, *N* financed the purchase of the police cars by using $30,000 of proceeds of its tax exempt general obligation bonds issued on February 5, 1992. On February 5, 1992, *N* reasonably expected to use the proceeds of the general obligation bonds to finance the renovation of city hall and not to finance police cars. The $30,000 expenditure is eligible for a reimbursement allocation so long as it meets the other relevant requirements of this section.

(l) *Effective date*—(1) *In general.* The provisions of this section are proposed to be effective for all reimbursement allocations of proceeds of reimbursement bonds that are made with respect to obligations issued after September 7, 1991 (30 days after a public hearing with respect to these proposed regulations is held).

(2) *Transitional rule for certain expenditures.* The requirements of paragraphs (c)(1) and (2) of this section (concerning official intent) with respect to an expenditure paid by the issuer do not apply if—

(i) The expenditure was paid by the issuer after September 8, 1989, and before September 8, 1991,

(ii) There is objective evidence that, at the time the expenditure was paid, the issuer expected to reimburse the expenditure with proceeds of a borrowing (taxable or tax exempt), and

(iii) That expectation is reasonable as defined in paragraph (f) of this section.

Par. 3. The following new § 1.103–18 is added to read as follows:

§ 1.103–18 Proceeds of certain private activity bonds used for reimbursement.

(a) *General rule.* A reimbursement allocation (as defined in § 1.103–17(d)(2)) of proceeds of a private activity bond under section 141(d)(1)(A) relating to exempt facility bonds or section 141(d)(1)(D) relating to qualified small issue bonds to reimburse costs or expenditures paid prior to the date of issue of the bonds is treated as an expenditure of proceeds for purposes of sections 103 and 141–150 if—

(1) The property financed meets the requirements imposed under § 1.103–8(a)(5),

(2) The reimbursement bond (as defined in § 1.103–17(d)(1)) satisfies the requirements of §§ 1.103–17(k)(1)(ii) and (iii), and

(3) The obligations are not described in paragraph (c) of this section (relating to governmentally owned property).

(b) *Special rule for property owned by a governmental unit.* With respect to a bond described in paragraph (c) of this section, a reimbursement allocation of proceeds to reimburse costs or expenditures paid prior to the date of issue of the bonds is treated as an expenditure of proceeds for purposes of this section if—

(1) The property financed qualifies as an exempt facility under § 1.103–8(a)(5) and

(2) The reimbursement allocation of reimbursement bond proceeds complies with all of the requirements of § 1.103–17.

(c) *Description of governmentally owned private activity bond financed property.* A bond is described in this paragraph (c) if—

(1) The bonds are private activity bonds, and

(2) The proceeds of the bond are used to finance a facility that, for purposes of section 142(b)(1), is treated as owned by a governmental unit.

(d) *Effective date*—(1) *In general.* The provisions of this section are proposed

to be effective for all allocations of proceeds of reimbursement bonds that are made with respect to obligations issued after September 7, 1991 (30 days after a public hearing with respect to these proposed regulations is held).

(2) *Transitional rule for certain expenditures.* With respect to private activity bonds subject to the provisions of paragraph (b) of this section, the requirements of §§ 1.103-17(c)(1) and (2) (concerning official intent) do not apply if—

(i) The expenditure was paid by the issuer after September 8, 1989, and before September 8, 1991,

(ii) There is objective evidence that, at the time the expenditure was paid, the issuer expected to reimburse the expenditure with proceeds of a borrowing (taxable or tax exempt), and

(iii) That expectation is reasonable within the meaning of § 1.103-17(f).

PART 602—[AMENDED]

§ 602.101 [Amended]

Par. 4. The table of OMB Control Numbers in § 602.101 is amended by adding in the appropriate place in the table "§ 1.103-17 * * * 1545-1226".

Fred T. Goldberg,

Commissioner of Internal Revenue.

[FR Doc. 91-9561 Filed 4-19-91; 3:22 pm]

BILLING CODE 4830-01-M

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26 CFR Part 1

[EE-86-90]

RIN 1545-AP13

Minimum Funding Requirements—Plan Restoration; Public Hearing

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of public hearing on proposed regulations.

SUMMARY: This document provides notice of a public hearing relating to the minimum funding requirements of section 412 of the Internal Revenue Code of 1986 as they apply to plans that are restored by the Pension Benefit Guaranty Corporation.

DATES: The public hearing will be held on Friday, July 19, 1991, beginning at 10 a.m. Outlines of oral comments must be received by July 5, 1991.

ADDRESSES: The public hearing will be held in the Internal Revenue Service Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Requests to speak and outlines of oral comments should be submitted to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R, (EE-86-90), room 4429, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Felicia A. Daniels of the Regulations Unit, Assistant Chief Counsel (Corporate), 202-566-3935, (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations under section 412 of the Internal Revenue Code of 1986. The proposed regulations appeared in the **Federal Register** for Tuesday, October 23, 1990, at page 42728 (55 FR 42728).

The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR part 601) shall apply with respect to the public hearing. Persons who have submitted written comments within the time prescribed in the notice of proposed rulemaking and who also desire to present oral comments at the hearing on the proposed regulations should submit not later than Friday, July 5, 1991, an outline of oral comments/testimony to be presented at the hearing and the time they wish to devote to each subject.

Each speaker (or group of speakers representing a single entity) will be limited 10 minutes for an oral presentation exclusive of the time consumed by the questions from the panel for the government and answers to these questions.

Because of controlled access restrictions, attendees cannot be permitted beyond the lobby of the Internal Revenue Building until 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the persons testifying. Copies of the agenda will be available free of charge at the hearing.

By direction of the Commissioner of Internal Revenue:

Dale D. Goode,

Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 91-9409 Filed 4-24-91; 8:45 am]

BILLING CODE 4830-01-M

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26 CFR Part 1

[PS-163-84]

RIN 1545-AH22

Treatment of Transactions Between Partners and Partnerships

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the treatment of transactions between partners and partnerships and, in some instances, between partners themselves, under section 707 of the Internal Revenue Code. Changes to the applicable law were made by the Tax Reform Act of 1984. The proposed regulations affect partnerships and their partners, and are necessary to provide them with guidance needed to comply with the applicable tax law.

DATES: Written comments and requests to appear at a public hearing scheduled for September 23, 1991, at 10 a.m. must be received by July 24, 1991. Outlines of oral comments must be received by September 9, 1991. See notice of hearing published elsewhere in this issue of the **Federal Register.**

ADDRESSES: Send comments, requests to appear at the public hearing, and outlines to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R (PS-163-84), Room 4429, Washington, DC 20044. The public hearing will be held in the IRS Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the hearing, Bob Boyer, Regulations Unit, (202) 566-3935 (not a toll-free number); concerning a particular regulation section, Susan T. Edlavitch or J. Scott Hargis at (202) 343-8459 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504 (h)). Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224.

The collection of information in these proposed regulations is in § 1.707-8. This information is required by the Internal Revenue Service to assure that section 707(a)(2) of the Internal Revenue Code and the regulations thereunder are properly applied to transfers by a partner to a partnership or by a partnership to a partner. This information will be used to determine whether partners or partnerships are

complying with section 707(a)(2) and the regulations thereunder. The respondents will be partnerships and members of partnerships.

The following estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

Estimated total annual reporting burden: 3000 hours.

Estimated burden per respondent varies from 15 minutes to 25 minutes, depending on individual circumstances, with an estimated average of 20 minutes.

Estimated number of respondents: 9000.

Estimated frequency of responses: Annually.

Introduction

This document proposes to add new regulations § 1.707–0 and §§ 1.707–2 through 1.707–9 to part 1 of title 26 of the Code of Federal Regulations. No change to existing § 1.707–1 is proposed.

Background

Contributions to and distributions from partnerships are generally tax-free under sections 721 and 731 of the Code, respectively. Section 707(a), prior to its amendment by the Tax Reform Act of 1984 (the "1984 Act"), provided that, if a partner engaged in a transaction with a partnership other than in his or her capacity as a partner, the transaction would be treated as "occurring between the partnership and one who is not a partner."

The 1984 Act added section 707(a)(2)(B) of the Code, which grants broad regulatory authority to identify those transactions that, though structured as contributions and distributions under sections 721 and 731, are more properly treated under section 707(a) as sales or exchanges between a partnership and a partner acting in a capacity other than as a member of the partnership. The 1984 Act also added section 707(a)(2)(A), which, in relevant part, grants broad regulatory authority to treat a transfer of property by a partner to a partnership and a related direct or indirect allocation and distribution to the partner as a sale or exchange if the transfers are properly viewed together as occurring between a partnership and a partner acting in a capacity other than as a partner. The proposed regulations apply to contributions and distributions described in section 707(a)(2)(A) and transfers described in section 707(a)(2)(B) of the Code.

This grant of regulatory authority to define "disguised sales" resulted from Congressional concern that existing regulations had not prevented the courts from relying on form, rather than substance, in determining whether transactions should be treated as sales between third parties under section 707 (a) of the Code or as contributions and distributions under sections 721 and 731. *See* H.R. Rep. No. 432 (Pt. 2), 98th Cong., 2d Sess. 1218 (1984) ("H.R. Rep."); S. Prt. No. 169 (Vol. I), 98th Cong., 2d Sess. 224–25 (1984) ("S. Prt"). Longstanding authority to recharacterize a transaction as a sale had been incorporated in § 1.721–1(a) of the Income Tax Regulations, which provides that the substance of a transaction, rather than its form, will govern in determining whether section 721 or section 731 should apply. Section 1.731–1(c)(3) similarly provides that a distribution does not fall within the scope of section 731 if it occurs "within a short period" of a contribution of property to the partnership, and that section 731 does not apply to a distribution of property that "in fact" is made to effect an exchange of property.

Notwithstanding these regulations, court decisions continued to permit tax-free treatment in cases that Congress considered to be economically indistinguishable from a sale of all or part of the property. Cited in the committee reports to the 1984 Act are *Otey* v. *Commissioner*, 70 T.C. 312 (1978), *aff'd per curiam*, 634 F.2d 1046 (6th Cir. 1980); *Communications Satellite Corp.* v. *United States*, 223 Ct. Cl. 253, 625 F.2d 997 (1980); and *Jupiter Corp.* v. *United States*, 2 Cl. Ct. 58 (1983). H.R. Rep. at 1218; S. Prt. at 225.

The legislative history of section 707 (a)(2) of the Code indicates that Congress intended that the Treasury Department have broad authority to prescribe regulations that it considers necessary to carry out the purposes of this provision, but also indicates that Congress was concerned with disguised sales of property and not with non-abusive transactions that reflect the various economic contributions of the partners. H.R. Rep. at 1220; S. Prt. at 230. In balancing these potentially conflicting concerns, Congress anticipated that the regulations would take into account all the facts and circumstances to determine whether a given transaction substantially resembles a sale or exhange of all or part of the property. S. Prt. at 230.

Explanation of Provisions

I. In General

After review of the statute and legislative history, the Service and the Treasury Department have determined that when a partner transfers property to a partnership, nominally as a contribution, and receives a transfer, nominally as a distribution, the two transfers should be viewed as related and properly characterized as components of a disguised sale only to the extent their combined effect is to allow the transferring partner to withdraw all or a part of his or her equity in the transferred property. For this purpose, the partnership's assumption of (or taking subject to) certain liabilities is considered a withdrawal of the partner's equity in the transferred property to the extent responsibility for those liabilities is shifted (as determined under this proposed regulation) to the other partners. Under this equity-withdrawal approach, a contribution of property to the partnership will not be treated as part of a disguised sale if the transferring partner is merely converting his or her equity in the transferred property into an interest in partnership capital that is subject to the entrepreneurial risks of partnership operations. Thus, if a partner contributes property to a partnership and, as a result, the partner's equity in the contributed property is converted into a genuine entrepreneurial interest in partnership capital, any subsequent distributions that liquidate that capital interest should not be treated as related to the contribution. If, on the other hand, a partner's equity in contributed property is not converted, in substance as well as form, into a genuine interest in partnership capital that is subject to the entrepreneurial risks of partnership operations, any distributions that represent a withdrawal of the partner's equity in the transferred property are properly characterized as part of a disguised sale of the property under section 707(a)(2). Accordingly, the proposed regulations require that all the facts and circumstances be considered in determining when a partner's equity is being withdrawn and when the transfer is properly viewed as a sale.

II. General Rules Regarding Disguised Sales to Partnership

Tax Consequences

If a contribution and related distribution are treated as a disguised sale under the rules of the proposed regulations, the contribution and

distribution will be treated as a sale or exchange between the partnership and a person acting in a capacity other than as a member of the partnership for all purposes of the Code, including sections 453, 483, 1001, 1012, 1031 and 1274. For example, if the transaction is treated as a disguised sale, and it otherwise meets the requirements of section 1031, it will be treated as a tax-free exchange under section 1031.

If the consideration treated as transferred to a partner pursuant to a sale is less than the fair market value of the property transferred to the partnership, the transfer will be treated as a sale in part and a contribution in part, and the transferring partner must prorate his or her basis in the property between the portion of the property sold and the portion of the property contributed. Any transfer of property to a partnership that is treated as part of a disguised sale is not reflected in the transferring partner's capital account.

If a transfer to a partner that is part of a disguised sale occurs subsequent to the partner's transfer of property to the partnership, the partner will be treated as if he or she received an obligation of the partnership as consideration for the property on the date the partnership acquired ownership of the property. If section 453 is otherwise applicable, the partner will be required to report gain on the sale under the installment sale rules.

The proposed regulations provide that if a taxpayer structures a disguised sale as a contribution to a partnership, the taxpayer may not then assert either that the taxpayer is not a partner or that no partnership exists in order to avoid the application of these rules. The proposed regulations also provide that, in appropriate circumstances, a transaction will be considered a sale between the purported partners rather than a sale to a partnership.

Facts and Circumstances Test

Under the proposed regulations, disguised sale treatment results if, based on all the facts and circumstances, (1) a transfer of money or other consideration would not have been made but for the transfer of property; and (2) if the transfers are not made simultaneously, the subsequent transfer is not dependent on the entrepreneurial risks of partnership operations. The proposed regulations list a series of factors that, among others, tend to indicate the existence of a disguised sale. The weight given each of the factors will depend on the circumstances of each case.

Presumptions Related to the Timing of Transfers

The legislative history of section 707 (a)(2) of the Code focuses on transfers made within a relatively short time period of each other in distinguishing disguised sales from contributions and distributions. H.R. Rep. at 1221; S. Prt. at 231. Consistent with that focus, the proposed regulations provide that transfers between a partnership and a partner that are made within two years of each other are presumed to be a sale (unless one of the exceptions applicable to guaranteed payments for capital, reasonable preferred returns or operating cash flow distributions applies), and transfers made more than two years apart are presumed not to be a sale. Each of these presumptions may be rebutted only by facts and circumstances that clearly establish the contrary. These presumptions do not affect a taxpayer's obligation to report a transaction in accordance with its substance.

Multiple Property Transfers

In the case of multiple property transfers, special rules apply to prevent a partner from selectively selling certain property (*e.g.*, property with a high basis) and contributing other property to the partnership. The partner is required to allocate the amount realized from the disguised sale among all the properties transferred as part of a planned transaction, based on the relative fair market values of each property (reduced by any qualified liability with respect to that property).

III. Special Rules Applicable to Certain Distributions

The legislative history of section 707 (a) (2) indicates that Congress did not intend to prevent partners from receiving priority or preferential distributions in return for their contributions of capital. H.R. Rep. at 1221; S. Prt. at 231. These distributions do not represent amounts paid in exchange for property, but instead represent payments for the use of property. The proposed regulations contain special rules that apply to these distributions.

Guaranteed Payments for Capital

The term guaranteed payment for capital means a payment to a partner that is determined without regard to partnership income and is for the use of that partner's capital. A guaranteed payment for capital may be funded from sources outside the partnership. In addition, a guaranteed payment for capital is generally related to a transfer of property or money to a partnership. In many cases, therefore, a legitimate guaranteed payment for capital is not subject to the entrepreneurial risks of partnership operations and would be treated as part of a sale if the payment were tested under the general rules of § 1.707–3. Accordingly, under the proposed regulations, guaranteed payments for capital are excepted from the general rules and are not treated as part of a sale of property. A partner's characterization of a transfer as a guaranteed payment for capital will not control in determining whether a transfer is, in fact, a guaranteed payment for capital. The determination of whether a transfer is part of a sale or a guaranteed payment for capital will be made by examining whether the transfer is designed to liquidate all or part of the partner's interest in property transferred to the partnership or, on the other hand, is designed to provide the partner with a return on an investment in the partnership.

A transfer that is characterized by the parties as a guaranteed payment for capital and that is reasonable within the meaning of § 1.707–4 (a) (3) will be presumed to be, in fact, a guaranteed payment for capital. A transfer that is characterized by the parties as a guaranteed payment for capital and that is not reasonable will be presumed not to be a guaranteed payment for capital. Each presumption can be rebutted only by facts and circumstances that clearly establish the contrary. If a transfer characterized by the parties as a guaranteed payment for capital is not respected as such, the transfer is subject to the general rules of the proposed regulations, including the presumptions for transfers made less than or more than two years apart. The proposed regulations do not provide explicitly that a distribution that is properly characterized as a guaranteed payment for services will not be treated as part of a sale because such a distribution is not related to a transfer of property by a partner.

Reasonable Preferred Returns

The proposed regulations provide that a transfer of money that is characterized by the parties as a preferred return and that is reasonable within the meaning of § 1.707–4 (a) (3) is presumed not to be part of a sale unless the facts and circumstances clearly establish that the transfer is part of a sale.

Operating Cash Flow Distributions.

The proposed regulations provide that transfers of money to a partner during a taxable year that do not exceed the

partner's interest in net operating cash flow are presumed not to be part of a sale unless the facts and circumstances clearly establish that the transfers are part of a sale. For this purpose, a partner's interest in a net operating cash flow distribution is determined based on the lesser of the partner's percentage interest in overall partnership profits for the year and the partner's percentage interest in overall partnership profits for the life of the partnership. The proposed regulations provide a safe harbor allowing a partner, in any taxable year of the partnership, to use the partner's smallest percentage interest in any material item of partnership income or gain that may be realized in the three-year period beginning with such taxable year. This is merely a safe harbor and is not intended to preclude the partner from using a different percentage under the general rule for calculating the partner's net operating cash flow distribution.

Reimbursement of Preformation Expenditures

The proposed regulations treat transfers made to reimburse partners for certain capital expenditures and costs incurred in anticipation of the formation of a partnership as distributions under section 731. For this exception to apply, the expenditures must have been incurred within one year of the transfer by the partner to the partnership. In addition, in the case of capital expenditures made with respect to property contributed to the partnership, the reimbursed capital expenditures may not exceed 20 percent of the fair market value of the property.

IV. Special Rules Relating to Liabilities.

In General

The legislative history of section 707 (a) (2) of the Code states that a transfer of property by a partner to a partnership may be treated as a disguised sale if the partner incurs debt in anticipation of the transfer and the partnership assumes (or takes subject to) the debt. H.R. Rep. at 1221; S. Prt. at 231. However, the Conference Report provides that "there will be no disguised sale under the provision to the extent the contributing partner, in substance, retains liability for repayment of the borrowed amounts (*i.e.*, to the extent the other partners have no direct or indirect risk of loss with respect to such amounts) since, in effect, the partner has simply borrowed through the partnership." H.R. Rep. No. 861, 98th Cong., 2d Sess. 862 (1984) (Conf. Rep.). In developing the concept of debt incurred in anticipation of a transfer, the proposed regulations distinguish between debt incurred more than two years before the transfer (or a written agreement to transfer), which is never treated as debt incurred in anticipation of the transfer, and debt incurred within two years of the transfer (or written agreement), which is generally treated as debt incurred in anticipation of the transfer. Further, the proposed regulations provide that acquisition or improvement debt or trade payables related to the transferred property are never treated as debt incurred in anticipation of the transfer. Under the proposed regulations, a partnership's assumption of (or taking subject to) a liability that is treated as incurred in anticipation of the transfer is treated as part of a sale. In contrast, the assumption of (or taking subject to) a liability treated as not incurred in anticipation of the transfer—referred to as a "qualified liability" and defined more precisely below—is treated as part of a sale only to the extent the partner is otherwise treated as having sold a portion of the property.

In determining the amount of the liability treated as consideration transferred in connection with a disguised sale, the proposed regulations, consistent with the legislative history, provide that the consideration is the amount of the liability deemed to be shifted under the proposed regulations to another partner. In the case of a qualified liability, however, the amount of the liability treated as consideration, if any, is the lesser of (1) the amount deemed to be shifted to another partner and (2) the amount that bears the same proportion to the total liability that the net equity the partner has extracted from the property bears to the total net equity the partner had in the property. To the extent the assumption of (or taking subject to) a liability is not treated as part of a sale, the consequences of a shift of the liability will be determined solely under section 752 and the rules of subchapter K other than section 707 (a)(2).

Partner's Share of Liability

For purposes of section 707(a)(2) of the code, a partner's share of a recourse liability equals the partner's share of the liability under section 752 and the corresponding regulations. Generally, a partner's share of a nonrecourse liability is determined by multiplying the liability by either the partner's "predominant share" in net income from the property or the partner's smallest percentage interest in an item of income or gain from the property. If the partner's predominant share cannot be determined, or the partner chooses not to use the predominant share, the partner must use the partner's smallest percentage interest in any material item of income or gain from the property securing the liability for any year. A partner's predominant share is that partner's allocation percentage that is reasonably expected to be in effect when more of the net income (including gain) from the encumbered property is realized by the partnership and allocated than when any other allocation percentage included in the partnership agreement is in effect. For the purpose of determining the percentage interest, a partner's distributive share (including guaranteed payments) is taken into account, but certain required allocations under section 704 and the underlying regulations are disregarded.

Alternatives Considered Regarding Share of Nonrecourse Debt

The Service and the Treasury Department considered numerous approaches for determining a partner's share of a nonrecourse liability before adopting the approach taken in the proposed regulations. One alternative considered was to adopt the rules provided in section 752 and the regulations thereunder. Under this approach, a transferring partner's share of a nonrecourse liability would reflect the full amount of built-in gain under section 704(c). This approach would produce an inverse relationship between the gain inherent in the contributed property and the extent to which a disguised sale of the property results from the encumbrance. This would be an inappropriate result.

After consideration of a full range of alternatives, the Service and the Treasury Department determined that the proposed regulations should adopt an approach under which a partner's share of a nonrecourse liability would reflect the partner's share of the profits from the encumbered property. A simple method of carrying out this objective is to allocate the nonrecourse liability to the transferring partner based on the partner's smallest percentage share of the profits from the encumbered property. Because that approach might be unduly restrictive and create unfair results for taxpayers in certain situations, the proposed regulations provide that a partner's share of a nonrecourse liability may be determined with respect to the partner's predominant share of partnership profits from the encumbered property.

A partner's predominant share of partnership profits is the partner's allocation percentage that is reasonably expected to be in effect when more net

income (including gain) from the encumbered property will be realized by the partnership and allocated than when any other percentage provided in the partnership agreement is in effect. In certain cases in which a partner's predominant share is not clear, the determination of a partner's predominant share may require a reasonable projection of the amount and timing of anticipated net income from the encumbered property and a projection of how that net income will be allocated among the partners. This may impose an administrative burden on taxpayers. The proposed regulations, therefore, adopt a rule under which taxpayers may choose to use either the predominant-share approach or the smallest-percentage-share approach.

Subsequent Reduction in Partner's Share of Liability

A subsequent reduction in a partner's share of a liability may be considered to be part of a disguised sale if the reduction is anticipated at the time the partner transfers property to the partnership, and if the reduction is part of a plan that has as one of its principal purposes minimizing the extent to which the assumption of (or taking subject to) the liability is treated as part of a sale. In this case, the reduction will be taken into account indetermining the partner's share of the liability immediately after the liability is assumed (or taken subject to) by the partnership.

Rules for Qualified Liabilities

The term "qualified liability" encompasses (1) debt encumbering property transferred to a partnership if the debt was incurred more than two years prior to the earlier of the time a written agreement to transfer the property is entered into or the time the property is transferred, (2) debt encumbering property transferred to a partnership if the debt was incurred within two years of a written agreement to transfer or a transfer of the property but was not incurred in anticipation of the transfer, (3) acquisition or improvement debt, and (4) trade payables assumed by the partnership in connection with a transfer to the partnership of the business that generated the trade payables. Debt incurred within two years of the earlier of the date of a written agreement to transfer property or the date of the transfer of the property is presumed to have been incurred in anticipation of the transfer unless the facts and circumstances clearly establish otherwise.

The proposed regulations provide that a qualified liability may be treated as part of a disguised sale only to the extent that the transferring partner is otherwise treated as having sold a portion of the property encumbered by that liability. Thus, if a partner who transfers property encumbered by a qualified liability receives no consideration from the partnership other than the assumption of (or taking subject to) the qualified liability, the assumption of (or taking subject to) that liability will not be considered part of a disguised sale. On the other hand, if the partnership transfers additional consideration to the partner pursuant to a sale, the partnership's assumption of (or taking subject to) the qualified liability may be treated as consideration received in a disguised sale.

In the latter case, the portion of the qualified liability treated as consideration received pursuant to a sale equals the lesser of (1) the amount of the qualified liability that would have been treated as consideration if the liability were not a qualified liability, or (2) the amount of the qualified liability multiplied by the partner's "net equity percentage" with respect to the property. The partner's net equity percentage is determined by dividing (A) the aggregate amount of consideration transferred (or to be transferred) by the partnership (other than the amount of qualified liabilities) that is treated as part of a sale of the property, by (B) the fair market value of the property reduced by the qualified liabilities.

Multiple Liabilities Assumed in Connection with a Plan

The proposed regulations apply a special netting rule to liabilities (other than qualified liabilities) assumed (or taken subject to) in connection with an integrated transaction. In the case of transfers of property to a partnership by more than one partner pursuant to a plan, each partner's share of the liabilities assumed (or taken subject to) by the partnership pursuant to the plan equals the partner's share of all of the liabilities (other than qualified liabilities) assumed (or taken subject to) by the partnership pursuant to the plan. Accordingly, the determination of the amount of liabilities of which any partner is relieved takes into account that partner's share of other liabilities associated with property contributed by other partners pursuant to the plan.

Debt-Financed Consideration

Under the proposed regulations, if a partnership transfers money or other consideration within 90 days of incurring a liability and the transfer is allocable under the rules of § 1.163–8T to such liability, the amount transferred from the partnership that may be treated as part of a disguised sale is reduced by the partner's share of the portion of the liability that is allocable under § 1.163–8T to the money or other consideration transferred to the partner. Special rules are also provided for debt-financed transfers to more than one partner pursuant to a plan, subsequent reductions in a partner's share of the liability, and refinancings.

V. Outbound Transactions Involving a Disguised Sale of Property by a Partnership to a Partner

Section 1.707–6 provides rules relating to disguised sales by a partnership to a partner. The rules are similar to the rules provided in §§ 1.707–3 and 1.707–5 for disguised sales by a partner to a partnership.

VI. Disclosure

The proposed regulations provide that certain transactions are to be reported by partners and partnerships on Internal Revenue Service Form 8275 or on a statement attached to the partner's return. (Meeting the disclosure requirements of this proposed regulation does not necessarily satisfy the disclosure requirements of section 6662 of the Code and the regulations proposed thereunder (regarding the penalty for underpayment of tax), if that section is otherwise applicable.) Generally, the situations for which disclosure is to be made for purposes of section 707(a)(2) are: (1) when certain transfers to a partner are made within two years of a transfer of property by the partner to the partnership; (2) when a partner uses an allocation percentage other than the smallest percentage to allocate nonrecourse debt; and (3) when debt is incurred within two years of the earlier of a written agreement to transfer or of a transfer of the property that secures the debt, but, nevertheless, is treated as a qualified liability. Similar disclosure rules are provided in the case of outbound transactions under § 1.707–6 of the proposed regulations.

VII. Effective Dates

The regulations are proposed to apply to transactions with respect to which all transfers considered part of a sale occur after April 24, 1991. The proposed regulations state that a determination of disguised sale treatment for the period between the effective date of section 707(a)(2) of the Code and the effective date of the proposed regulations is to be made based on the statutory language and the guidance provided in the legislative history of section 707(a)(2).

VIII. Request for Comments

The Service invites public comment on the rules proposed in these regulations. In particular, the Service solicits comments on the adequacy of the special rules relating to priority and cash flow distributions and alternatives to the rules relating to the treatment of nonrecourse liabilities. The Service especially encourages suggestions concerning additional safe harbors that would both further the intent of Congress and reduce the administrative burden on taxpayers and the Service. Furthermore, under the proposed regulations, when a disguised sale is considered to take place, it is generally treated as occurring between the partner and the partnership. The Service solicits comment on the appropriateness of this approach and the circumstances in which it would be appropriate to treat the sale as occurring among the partners outside the partnership. In addition, the Service requests comments on the rules to be provided in § 1.707–7 with respect to sales of partnership interests.

Special Analyses

It has been determined that these proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, an initial Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably a signed original and eight copies) to the Internal Revenue Service. All comments will be available for public inspection and copying. A public hearing will be held on September 23, 1991, beginning at 10 a.m. Requests to speak and outlines of oral comments must be received by September 9, 1991. The public hearing will be held in the IRS auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Requests to speak and outlines of oral comments should be submitted to the Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R (PS–163–84), Room 4429, Washington, DC 20044. See notice of hearing published elsewhere in this issue of this **Federal Register.**

Drafting Information

The principal authors of these proposed regulations are David R. Haglund and Susan T. Edlavitch of the Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, personnel from other offices of the Internal Revenue Service and the Treasury Department participated in their development.

List of Subjects in 26 CFR 1.701–1 through 1.771–1

Income taxes, Partnerships.

Proposed Amendments to the Regulations

The proposed amendments to 26 CFR part 1 are as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805 * * * § 1.707–0 and §§ 1.707–2 through 1.707–9 are also issued under 26 U.S.C. 707 (a)(2).

Par. 2. New §§ 1.707–0 and 1.707–2 through 1.707–9 are added to read as follows:

§ 1.707–0 Table of Contents.

This section lists the captions that appear in §§ 1.707–1 through 1.707–9.

§ 1.707–1 Transactions between partner and partnership.

(a) Partner not acting in capacity as partner.
(b) Certain sales or exchanges of property with respect to controlled partnerships.
(1) Losses disallowed.
(2) Gains treated as ordinary income.
(3) Ownership of a capital or profits interest.
(c) Guaranteed payments.

§ 1.707–2 Disguised payments for services.

[Reserved.]

§ 1.707–3 Disguised sales of property to partnership; general rules.

(a) Treatment of transfers as a sale.
(1) In general.
(2) Definition and timing of sale.
(3) Application of disguised sale rules.
(b) Transfers treated as a sale.
(1) In general.
(2) Facts and circumstances.
(c) Transfers made within two years presumed to be a sale.
(1) In general.
(2) Disclosure of transfers made within two years.
(d) Transfers made more than two years apart presumed not to be a sale.
(e) Multiple properties transferred pursuant to a plan.
(f) Scope.
(g) Examples.

§ 1.707–4 Disguised sales of property to partnership; special rules applicable to guaranteed payments, preferred returns, operating cash flow distributions, and reimbursements of preformation expenditures.

(a) Guaranteed payments and preferred returns.
(1) Guaranteed payment not treated as part of a sale.
(i) In general.
(ii) Reasonable guaranteed payments.
(iii) Unreasonable guaranteed payments.
(2) Presumption regarding reasonable preferred returns.
(3) Definition of reasonable preferred returns and guaranteed payments.
(i) In general.
(ii) Reasonable amount.
(4) Examples.
(b) Presumption regarding operating cash flow distributions.
(1) In general.
(2) Operating cash flow distributions.
(i) In general.
(ii) Operating cash flow safe harbor.
(c) Distributions made within 75 days of year end.
(d) Exception for reimbursements of preformation expenditures.

§ 1.707–5 Disguised sales of property to partnership; special rules relating to liabilities.

(a) Liability assumed or taken subject to by partnership.
(1) In general.
(2) Partner's share of liability.
(i) Liability defined.
(ii) Recourse liability.
(iii) Nonrecourse liability.
(A) In general.
(B) Disclosure of the use of a percentage other than the smallest percentage.
(3) Reduction of partner's share of liability.
(4) Special rule applicable to transfers of encumbered property to a partnership by more than one partner pursuant to a plan.
(5) Special rule applicable to qualified liabilities
(6) Qualified liability of a partner defined.
(7) Liability incurred within two years of transfer presumed to be in anticipation of the transfer.
(i) In general.
(ii) Disclosure of transfers of property subject to liabilities incurred within two years of the transfer.
(b) Treatment of debt-financed transfers of consideration by partnerships.
(1) In general.
(2) Partner's allocable share of liability.
(i) In general.
(ii) Debt-financed transfers made pursuant to a plan.

§ 1.707-2 Disguised payments for services. [Reserved.]

§ 1.707-3 Disguised sales of property to partnership; general rules.

(a) *Treatment of transfers as a sale*—(1) *In general.* Except as otherwise provided in this section, if a transfer of property by a partner to a partnership and one or more transfers of money or other consideration by the partnership to that partner are described in paragraph (b)(1) of this section, the transfers are treated as a sale of property, in whole or in part, to the partnership.

(2) *Definition and timing of sale.* For purposes of §§ 1.707-3 through 1.707-5, the use of the term "sale" (or any variation of that word) to refer to a transfer of property by a partner to a partnership and a transfer of consideration by a partnership to a partner means a sale or exchange of that property, in whole or in part, to the partnership by the partner acting in a capacity other than as a member of the partnership, rather than a contribution and distribution to which sections 721 and 731, respectively, apply. A transfer that is treated as a sale under paragraph (a)(1) of this section is treated as a sale for all purposes of the Code (*e.g.*, sections 453, 483, 1001, 1012, 1031, and 1274). The sale is considered to take place on the date that, under general principles of Federal tax law, the partnership is considered the owner of the property. If the transfer of money or other consideration from the partnership to the partner occurs after the transfer of property to the partnership, the partner and the partnership are treated as if, on the date of the sale, the partnership transferred to the partner an obligation to transfer to the partner money or other consideration.

(3) *Application of disguised sale rules.* If a person purports to transfer property to a partnership in a capacity as a partner, the rules of this section apply for purposes of determining whether the property was transferred in a disguised sale, even if it is determined after the application of the rules of this section that such person is not a partner. If after the application of the rules of this section to a purported transfer of property to a partnership, it is determined that no partnership exists because the property was actually sold, or it is otherwise determined that the contributed property is not owned by the partnership for tax purposes, the transferor of the property is treated as having sold the property to the person (or persons) that acquired ownership of the property for tax purposes.

(b) *Transfers treated as a sale*—(1) *In general.* A transfer of property (excluding money or an obligation to contribute money) by a partner to a partnership and a transfer of money or other consideration (including the assumption of or the taking subject to a liability) by the partnership to the partner constitute a sale of property, in whole or in part, by the partner to the partnership only if based on all the facts and circumstances—

(i) The transfer of money or other consideration would not have been made but for the transfer of property, and

(ii) In cases in which the transfers are not made simultaneously, the subsequent transfer is not dependent on the entrepreneurial risks of partnership operations.

(2) *Facts and circumstances.* The determination of whether a transfer of property by a partner to the partnership and a transfer of money or other consideration by the partnership to the partner constitute a sale, in whole or in part, under paragraph (b)(1) of this section is made based on all the facts and circumstances in each case. The weight to be given each of the facts and circumstances will depend on the particular case. Generally, the facts and circumstances existing on the date of the earliest of such transfers are the ones considered in determining whether a sale exists under paragraph (b)(1) of this section. Among the facts and circumstances that may tend to prove the existence of a sale under paragraph (b)(1) of this section are the following:

(i) That the timing and amount of a subsequent transfer are determinable with reasonable certainty at the time of an earlier transfer;

(ii) That the transferor has a legally enforceable right to the subsequent transfer;

(iii) That the partner's right to receive the transfer of money or other consideration is secured in any manner, taking into account the period during which it is secured;

(iv) That any person has made or is legally obligated to make contributions to the partnership in order to permit the partnership to make the transfer of money or other consideration;

(v) That any person has loaned or has agreed to loan the partnership the money or other consideration required to enable the partnership to make the transfer, taking into account whether any such lending obligation is subject to contingencies related to the result of partnership operations;

(vi) That the partnership has incurred or is obligated to incur debt to acquire the money or other consideration necessary to permit it to make the transfer, taking into account the likelihood that the partnership will be able to incur that debt (considering such factors as whether any person has agreed to guarantee or otherwise assume personal liability for that debt);

(vii) That the partnership holds money or other liquid assets, beyond the reasonable needs of the business, that are expected to be available to make the transfer (taking into account the income that will be earned from those assets);

(viii) That partnership distributions, allocations or control of partnership operations is designed to effect an exchange of the burdens and benefits of ownership of property;

(ix) That the transfer of money or other consideration by the partnership to the partner is disproportionately large in relationship to the partner's general and continuing interest in partnership profits; and

(x) That the partner has no obligation to return or repay the money or other consideration to the partnership, or has such an obligation but it is likely to become due at such a distant point in the future that the present value of that obligation is small in relation to the amount of money or other consideration transferred by the partnership to the partner.

(c) *Transfers made within two years presumed to be a sale*—(1) *In general.* For purposes of this section, if within a

two-year period a partner transfers property to a partnership and the partnership transfers money or other consideration to the partner (without regard to the order of the transfers), the transfers are presumed to be a sale of the property to the partnership unless the facts and circumstances clearly establish that the transfers do not constitute a sale.

(2) *Disclosure of transfers made within two years.* If—

(i) A partner transfers property to a partnership and the partnership transfers money or other consideration to the partner within a two-year period (without regard to the order of the transfers);

(ii) The partner treats the transfers other than as a sale for tax purposes; and

(iii) The transfer of money or other consideration to the partner is not presumed to be a guaranteed payment for capital under § 1.707–4(a)(1)(ii), is not a reasonable preferred return within the meaning of § 1.707–4(a)(3), and is not operating cash flow distribution within the meaning of § 1.707–4(b)(2),

such treatment is to be disclosed to the Internal Revenue Service in accordance with § 1.707–8.

(d) *Transfers made more than two years apart presumed not to be a sale.* For purposes of this section, if a transfer of money or other consideration to a partner by a partnership and the transfer of property to the partnership by that partner are more than two years apart, the transfers are presumed not to be a sale of the property to the partnership unless the facts and circumstances clearly establish that the transfers constitute a sale.

(e) *Multiple properties transferred pursuant to a plan.* If a partner transfers more than one item of property to a partnership pursuant to a plan, the amount realized from any transfer of money or other consideration made by the partnership pursuant to the plan that is treated as part of a sale of property under paragraph (a) of this section is allocated among each item of property transferred pursuant to that plan based upon the relative fair market values of the properties. For purposes of applying the preceding sentence, the fair market value of an item of property transferred to a partnership is reduced by the amount of any qualified liability with respect to that property. See § 1.707–5(a)(6) for the meaning of qualified liability of a partner. The allocation rules of this paragraph do not apply to consideration transferred in the form of the assumption of or taking subject to a qualified liability.

(f) *Scope.* This section and §§ 1.707–4 through 1.707–9 apply to contributions and distributions of property described in section 707(a)(2)(A) and transfers described in section 707(a)(2)(B) of the Code.

(g) *Examples.* The following examples illustrate the application of this section.

Example 1. Treatment of simultaneous transfers as a sale. A transfers property X to partnership AB on April 9, 1992, in exchange for an interest in the partnership. At the time of the transfer, property X has a fair market value of $4,000,000 and an adjusted tax basis of $1,200,000. Immediately after the transfer, the partnership transfers $3,000,000 in cash to A. Assume that, under this section, the partnership's transfer of cash to A is treated as part of a sale of property X to the partnership. Because the amount of cash A receives on April 9, 1992, does not equal the fair market value of the property, A is considered to have sold a portion of property X with a value of $3,000,000 to the partnership in exchange for cash. Accordingly, A must recognize $2,100,000 of gain ($3,000,000 amount realized less $900,000 adjusted tax basis ($1,200,000 multiplied by $3,000,000/$4,000,000)). Assuming A receives no other transfers that are treated as consideration for the sale of the property under this section, A is considered to have contributed to the partnership, in A's capacity as a partner, $1,000,000 of the fair market value of the property with an adjusted tax basis of $300,000.

Example 2. Treatment of transfers at different times as a sale. (i) The facts are the same as in *Example 1*, except that the $3,000,000 is transferred to A one year after A's transfer of property X to the partnership. Assume that under this section the partnership's transfer of cash to A is treated as part of a sale of property X to the partnership. Assume also that the applicable Federal short-term rate for April 1992 is 10 percent, compounded semiannually.

(ii) Under paragraph (a)(2) of this section, A and the partnership are treated as if, on April 9, 1992, A sold a portion of property X to the partnership in exchange for an obligation to transfer $3,000,000 to A one year later. Section 1274 applies to this obligation because it does not bear interest and is payable more than six months after the date of the sale. As a result, A's amount realized from the receipt of the partnership's obligation will be the imputed principal amount of the partnership's obligation to transfer $3,000,000 to A, which equals $2,721,088 (the present value on April 9, 1992, of a $3,000,000 payment due one year later, determined using a discount rate of 10 percent, compounded semiannually). Therefore, A's amount realized from the receipt of the partnership's obligation is $2,721,088 (without regard to whether the sale is reported under the installment method). A is therefore considered to have sold only $2,721,088 of the fair market value of property X. The remainder of the $3,000,000 payment ($278,912) is characterized in accordance with the provisions of section 1272. Accordingly, A must recognize $1,904,761 of gain ($2,721,088 amount realized less $816,327 adjusted tax basis ($1,200,000 multiplied by $2,721,088/$4,000,000)) on the sale of property X to the partnership. The gain is reportable under the installment method of section 453 if the sale is otherwise eligible. Assuming A receives no other transfers that are treated as consideration for the sale of property under this section, A is considered to have contributed to the partnership, in A's capacity as a partner, $1,278,912 of the fair market value of property X with an adjusted tax basis of $383,673.

Example 3. Operation of presumption for transfers within two years. (i) C transfers undeveloped land to the CD partnership in exchange for an interest in the partnership. The partnership intends to construct a building on the land. At the time the land is transferred to the partnership, it is unencumbered and has an adjusted tax basis of $500,000 and a fair market value of $1,000,000. The partnership agreement provides that upon completing construction of the building the partnership will distribute $900,000 to C.

(ii) If, within two years of C's transfer of land to the partnership, a transfer is made to C pursuant to the provision requiring a distribution upon completion of the building, the transfer is presumed to be, under paragraph (c) of this section, part of a sale of the land to the partnership. C may rebut the presumption that the transfer is part of a sale if the facts and circumstances clearly establish that (A) the transfer to C would have been made without regard to C's transfer of land to the partnership or that (B) the partnership's obligation or ability to make this transfer to C depends, at the time of the transfer to the partnership, on the entrepreneurial risks of partnership operations. For example, if the partnership will be able to fund the transfer of cash to C only to the extent that permanent loan proceeds exceed the cost of constructing the building, the fact that excess permanent loan proceeds will be available only if the cost to complete the building is materially less than the amount projected by a reasonable budget would be evidence that the transfer to C is not part of a sale. Similarly, a condition that limits the amount of the permanent loan to the cost of constructing the building (and thereby limits the partnership's ability to make a transfer to C) unless all or a substantial portion of the building is leased would be evidence that the transfer to C is not part of a sale, if a significant risk exists that the partnership may not be able to lease the building to that extent. Another factor that may prove that the transfer of cash to C is not part of a sale would be that, at the time the land is transferred to the partnership, no lender has committed to make a permanent loan to fund the transfer of cash to C.

(iii) Facts indicating that the transfer of cash to C is not part of the sale, however, may be offset by other factors. An offsetting factor to restrictions on the permanent loan proceeds may be that the permanent loan is to be a recourse loan and certain conditions to the loan are likely to be waived by the lender because of the creditworthiness of the partners or the value of the partnership's other assets. Similarly, the factor that no

lender has committed to fund the transfer of cash to C may be offset by facts establishing that the partnership is obligated to attempt to obtain such a loan and that its ability to obtain such a loan is not materially dependent on the value that will be added by successful completion of the building, or that the partnership reasonably anticipates that it will have (and will utilize) an alternative source to fund the transfer of cash to C if the permanent loan proceeds are inadequate.

Example 4. Operation of presumption for transfers within two years. E is a partner in the equal EF partnership. The partnership owns two parcels of unimproved real property. ("parcels 1 and 2"). Parcels 1 and 2 are unencumbered. Parcel 1 has a fair market value of $500,000, and parcel 2 has a fair market value of $1,500,000. E transfers additional unencumbered, unimproved real property ("parcel 3") with a fair market value of $1,000,000 to the partnership in exchange for an increased interest in partnership profits of 66⅔ percent. Immediately after this transfer, the partnership sells parcel 1 for $500,000. The partnership transfers the proceeds of the sale $333,333 to E and $166,667 to F in accordance with their respective partnership interests. The transfer of $333,333 to E is presumed to be, in accordance with paragraph 9c) of this section, a sale, in part, of parcel 3 to the partnership. However, the facts of this example clearly establish that $250,000 of the transfer to E is not part of a sale of parcel 3 to the partnership because E would have been distributed $250,000 from the sale of parcel 1 whether or not E had transferred parcel 3 to the partnership. The transfer to E exceeds by $83,333 ($333,333 minus $250,000) the amount of the distribution that would have been made to E if E had not transferred parcel 3 to the partnership. Therefore, $83,333 of the transfer is presumed to be part of a sale of a portion of parcel 3 to the partnership by E.

Example 5. Operation of presumption for transfers more than two years apart. (i) G transfers undeveloped land to the GH partnership in exchange for an interest in the partnership. At the time the land is transferred to the partnership, it is unencumberred and has an adjusted tax basis of $500,000 and a fair market value of $1,000,000. H contributes $1,000,000 in cash in exchange for an interest in the partnership. Under the partnership agreement, the partnership is obligated to construct a building on the land. The projected construction cost is $5,000,000, which the partnership plans to fund with its $1,000,000 in cash and the proceeds of a construction loan secured by the land and improvements.

(ii) Shortly before G's transfer of the land to the partnership, the partnership secures commitments from lending institutions for construction and permanent financing. To obtain the construction loan, H guarantees completion of the building for a cost of $5,000,000. The permanent loan will be funded upon completion of the building, which is expected to occur two years after G's transfer of the land. The amount of the permanent loan is to equal the lesser of $5,000,000 or 80 percent of the appraised value of the improved property at the time the permanent loan is closed. Under the partnership agreement, the partnership is obligated to apply the proceeds of the permanent loan to retire the construction loan and to hold any excess proceeds for transfer to G 25 months after G's transfer of the land to the partnership. The appraised value of the improved property at the time the permanent loan is closed is expected to exceed $5,000,000 only if the partnership is able to lease a substantial portion of the improvements by that time; and there is a material risk that the partnership will not be able to achieve a satisfactory occupancy level. The partnership completes construction of the building for the projected cost of $5,000,000 approximately two years after G's transfer of the land. Shortly thereafter, the permanent loan is funded in the amount of $5,000,000. At the time of funding the land and building have an appraised value of $7,000,000. The partnership transfers the $1,000,000 excess permanent loan proceeds to G 25 months after G's transfer of the land to the partnership.

(iii) G's transfer of the land to the partnership and the partnership's transfer of $1,000,000 to G occurred more than two years apart. In accordance with paragraph (d) of this section, those transfers are presumed not to be a sale unless the facts and circumstances clearly establish tht the transfers constitute a sale of the property, in whole or part, to the partnership. The transfer of $1,000,000 to G would not have been made but for G's transfer of the land to the partnership. In addition, at the time G transferred the land to the partnership, G had a legally enforceable right to receive a transfer from the partnership at a specified time an amount that equals the excess of the permanent loan proceeds over $4,000,000. In this case, however, there was a significant risk that the appraised value of the property would be insufficient to support a permanent loan in excess of $4,000,000 because of the risk that the partnership would not be able to achieve a sufficient occupancy level. Therefore, the facts of this example indicate that at the time G transferred the land to the partnership the subsequent transfer of $1,000,000 to G depended on the entrepreneurial risks of partnership operations. Accordingly, G's transfer of the land to the partnership is not treated as part of the sale.

Example 6. Rebuttal of presumption for transfers more than two years apart. The facts are the same as in *Example 5*, except that the partnership is able to secure a commitment for a permanent loan in the amount of $5,000,000 without regard to the appraised value of the improved property at the time the permanent loan is funded. Under these facts, at the time that G transferred the land to the partnership the subsequent transfer of $1,000,000 to G was not depenent on the entrepreneurial risks of partnership operations, because (1) during the period before the permanent loan is funded, the permanent lender's obligation to make a loan in the amount necessary to fund the transfer is not subject to contingencies related to the risks of partnership operations and (2) after the permanent loan is funded, the partnership holds liquid assets sufficient to make the transfer. Therefore, the facts and circumstances clearly establish that G's transfer of the land to the partnership is part of a sale.

Example 7. Operation of presumption for transfers more than two years apart. The facts are the same as in *Example 6*, except that H does not guarantee either that the improvements will be completed or that the cost to the partnership of completing the improvements will not exceed $5,000,000. Under these facts, if there is a significant risk that the improvements will not be completed G's transfer of the land to the partnership will not be treated as part of a sale because the lender is not required to make the permanent loan if the improvements are not completed. Similarly, the transfers will not be treated as a sale to the extent that there is a significant risk that the cost of constructing the improvements will exceed $5,000,000, because, in the absence of a guarantee of the cost of the improvements by H, the $5,000,000 proceeds of the permanent loan might not be sufficient to retire the construction loan and fund the transfer to G. In either case, the transfer of cash to G would be dependent on the entrepreneurial risks of partnership operations.

Example 8. Rebuttal of presumption for transfers more than two years apart. (i) On February 1, 1992, I, J, and K form partnership IJK. On formation of the partnership, I transfers an unencumbered office building with a fair market value of $50,000,000 and an adjusted tax basis of $20,000,000 to the partnership, and J and K each transfer United States government securities with a fair market value and an adjusted tax basis of $25,000,000 to the partnership. Substantially all of the rentable space in the office building is leased on a long-term basis. The partnership agreement provides that all items of income, gain, loss, and deduction from the office building are to be allocated 45 percent to J, 45 percent to K, and 10 percent to I. The partnership agreement also provides that all items of income, gain, loss, and deduction from the government securities are to be allocated 90 percent to I, 5 percent to J, and 5 percent to K. The partnership agreement requires that cash flow from the office building and government securities be allocated between partners in the same manner as the items of income, gain, loss, and deduction from those properties are allocated between them. The partnership agreement complies with the requirements of § 1.704–1 (b) (2) (ii) (*b*). It is not expected that the partnership will need to resort to the government securities or the cash flow therefrom to operate the office building. At the time the partnership is formed, I, J, and K contemplated that I's interest in the partnership would be liquidated sometime after January 31, 1994, in exchange for a transfer of the government securities and cash (if necessary). On March 1, 1995, the partnership transfers cash and the government securities to I in liquidation of I's interest in the partnership. The cash transferred to I represents the excess of I's share of the appreciation in the office building since the formation of the partnership over J's and K's share of the

appreciation in the government securities since they were acquired by the partnership.

(ii) I's transfer of the office building to the partnership and the partnership's transfer of the government securities and cash to I occurred more than two years apart. Therefore, those transfers are presumed not to be a sale unless the facts and circumstances clearly establish that the transfers constitute a sale. Absent I's transfer of the office building to the partnership, I would not have received the government securities from the partnership. The facts (including the amount and nature of partnership assets) indicate that, at the time that I transferred the office building to the partnership, the timing of the transfer of the government securities to I was anticipated and was not dependent on the entrepreneurial risks of partnership operations. Moreover, the facts indicate that the partnership allocations were designed to effect an exchange of the burdens and benefits of ownership of the government securities in anticipation of the transfer of those securities to I and those burdens and benefits were effectively shifted to I on formation of the partnership. Accordingly, the facts and circumstances clearly establish that I sold the office building to the partnership on February 1, 1992, in exchange for the partnership's obligation to transfer the government securities to I and to make certain other cash transfers to I.

Example 9. Multiple properties transferred pursuant to a plan. (i) As part of a plan, L transfers property X to partnership LM in exchange for a partnership interest and sells property Y to the partnership for $100,000 in cash. Property X has a fair market value of $100,000 and an adjusted tax basis of $5,000, and property Y has a fair market value and an adjusted tax basis of $100,000. Properties X and Y are unencumbered.

(ii) L transferred properties X and Y to the partnership pursuant to a plan. Therefore, under paragraph (a) of this section, the transfer of $100,000 in cash by the partnership to L is considered to be a sale of both properties X and Y to the partnership by L. In order to determine the extent to which those transfers are treated as part of a sale, the $100,000 in cash transferred to L must be allocated between properties X and Y in proportion to the fair market values of those properties (which equals $100,000 for each property). As a result, $50,000 of the cash transferred to L is treated as part of a sale of property X to the partnership ($100,000 multiplied by $100,000/$200,000), while the other $50,000 of the cash transferred to L is treated as part of a sale of property Y to the partnership ($100,000 multiplied by $100,000/$200,000). Therefore, under paragraph (a) of this section, L must recognize $47,500 of taxable gain ($50,000 amount realized less adjusted tax basis of $2,500) on the sale of one-half of property X to the partnership. L does not recognize any gain or loss with respect to the sale of one-half of property Y to the partnership ($50,000 amount realized less $50,000 adjusted tax basis).

§ 1.707-4 Disguised sales of property to partnership; special rules applicable to guaranteed payments, preferred returns, operating cash flow distributions, and reimbursements of preformation expenditures.

(a) *Guaranteed payments and preferred returns*—(1) *Guaranteed payment not treated as part of a sale*—(i) *In general.* A guaranteed payment for capital made to a partner is not treated as part of a sale of property under paragraph (a) of § 1.707-3 (relating to treatment of transfers as a sale). A party's characterization of a payment as a guaranteed payment for capital will not control in determining whether a payment is, in fact, a guaranteed payment for capital. The term "guaranteed payment for capital" means any payment to a partner by a partnership that is determined without regard to partnership income and is for the use of that partner's capital. See section 707(c). For this purpose, one or more payments are not made for the use of a partner's capital if the payments are designed to liquidate all or part of the partner's interest in property contributed to the partnership rather than to provide the partner with a return on an investment in the partnership.

(ii) *Reasonable guaranteed payments.* Notwithstanding the presumption set forth in paragraph (c) of § 1.707-3 (relating to transfers made within two years of each other), for purposes of section 707(a)(2) and the regulations thereunder a transfer of money to a partner that is characterized by the parties as a guaranteed payment for capital, is determined without regard to the income of the partnership and is reasonable (within the meaning of paragraph (a)(3) of this section) is presumed to be a guaranteed payment for capital unless the facts and circumstances clearly establish that the transfer is not a guaranteed payment for capital and is part of a sale.

(iii) *Unreasonable guaranteed payments.* A transfer of money to a partner that is characterized by the parties as a guaranteed payment for capital but that is not reasonable (within the meaning of paragraph (a)(3) of this section) is presumed not to be a guaranteed payment for capital unless the facts and circumstances clearly establish that the transfer is a guaranteed payment for capital. A transfer that is not a guaranteed payment for capital is subject to the rules of § 1.707-3.

(2) *Presumption regarding reasonable preferred returns.* Notwithstanding the presumption set forth in paragraph (c) of § 1.707-3 (relating to transfers made within two years of each other), a transfer of money to a partner that is characterized by the parties as a preferred return and that is reasonable (within the meaning of paragraph (a)(3) of this section) is presumed not to be part of a sale of property to the partnership unless the facts and circumstances (including the likelihood and expected timing of the subsequent allocation of income or gain to support the preferred return) clearly establish that the transfer is part of a sale. The term "preferred return" means a preferential distribution of partnership cash flow to a partner with respect to capital contributed to the partnership by the partner that will be matched, to the extent available, by an allocation of income or gain.

(3) *Definition of reasonable preferred returns and guaranteed payments*—(i) *In general.* A transfer of money to a partner that is characterized as a preferred return or guaranteed payment for capital is reasonable only to the extent that the transfer is made to the partner pursuant to a written provision of a partnership agreement that provides for payment for the use of capital in a reasonable amount, and only to the extent that the payment is made for the use of capital after the date on which that provision is added to the partnership agreement.

(ii) *Reasonable amount.* A transfer of money that is made to a partner during any partnership taxable year and is characterized as a preferred return or guaranteed payment for capital is reasonable in amount if the sum of any preferred return and any guaranteed payment for capital that is payable for that year does not exceed the amount determined by multiplying the partner's unreturned capital at the beginning of the year (plus any unpaid preferred return or guaranteed payment for capital that is payable to the partner for any prior year) by the safe harbor interest rate for that year. The safe harbor interest rate for a partnership's taxable year equals 150 percent of the highest applicable federal rate in effect at any time from the time that the right to the preferred return or guaranteed payment for capital is first established pursuant to a binding, written agreement among the partners through the end of the taxable year. A partner's unreturned capital equals the excess of the aggregate amount of money and the fair market value of other consideration (net of liabilities) contributed by the partner to the partnership over the aggregate amount of money and the fair market value of other consideration (net of liabilities) distributed by the partnership to the partner other than transfers of

money that are presumed to be guaranteed payments for capital under paragraph (a)(1)(ii) of this section, transfers of money that are reasonable preferred returns within the meaning of this paragraph (a)(3), and operating cash flow distributions within the meaning of paragraph (b)(2) of this section.

(4) *Examples.* The following examples illustrate the application of paragraph (a) of this section:

Example 1. Transfer presumed to be a guaranteed payment. (i) A transfers property with a fair market value of $100,000 to partnership AB. At the time of A's transfer, the partnership agreement is amended to provide that A is to receive a guaranteed payment for the use of A's capital of 10 percent (compounded annually) of the fair market value of the transferred property in each of the three years following the transfer. The partnership agreement provides that partnership net taxable income and loss will be allocated equally between partners A and B, and that partnership cash flow will be distributed in accordance with the allocation of partnership net taxable income and loss. The partnership would be allowed a deduction in the year paid if the transfers made to A are treated as guaranteed payments under section 707(c). Under the partnership agreement, that deduction would be allocated in the same manner as any other item of partnership deduction. The partnership agreement complies with the requirements of § 1.704–1 (b)(2)(ii)(*b*). The partnership agreement does not provide for the payment of a preferred return and, other than the guaranteed payment to be paid to A, no transfer is expected to be made during the three year period following A's transfer that is not an operating cash flow distribution (within the meaning of paragraph (b)(2) of this section). Assume that the highest applicable federal rate in effect at the time of A's transfer equals eight percent compounded annually.

(ii) The transfer of money to be made to A under the partnership agreement is characterized by the parties as a guaranteed payment for capital and is determined without regard to the income of the partnership. The transfer is also reasonable within the meaning of § 1.707–4(a)(3). The transfer, therefore, is presumed to be a guaranteed payment for capital. The presumption set forth in paragraph (c) of § 1.707–3 (relating to transfers made within two years of each other) thus does not apply to this transfer. The transfer will not be treated as part of a sale of property to the partnership unless the facts and circumstances clearly establish that the transfer is not a guaranteed payment for capital but is part of a sale.

(iii) The presumption that the transfer is a guaranteed payment for capital is not rebutted, because there are no facts indicating that the transfer is not a guaranteed payment for the use of capital.

Example 2. Transfers characterized as guaranteed payments treated as part of a sale. (i) C and D form partnership CD. C transfers property with a fair market value of $100,000 and an adjusted tax basis of $20,000 in exchange for a partnership interest. D is responsible for managing the day-to-day operations of the partnership and makes no capital contribution to the partnership upon its formation. The partnership agreement provides that C is to receive payments characterized as guaranteed payments and determined without regard to partnership income of $8,333 per year for the first four years of partnership operations for the use of C's capital. In addition, the partnership agreement provides that (1) partnership net taxable income and loss will be allocated 75 percent to C and 25 percent to D and (2) all partnership cash flow will be distributed 75 percent to C and 25 percent to D except that guaranteed payments that the partnership is obligated to make to C are payable solely out of D's share of the partnership's cash flow. If D's share of the partnership's cash flow is not sufficient to make the guaranteed payment to C, then D is obligated to contribute the shortfall to the partnership. The partnership agreement complies with the requirements of § 1.704–1(b)(2)(ii)(*b*). Assume that, at the time the partnership is formed, the partnership or D could borrow $25,000 pursuant to a loan requiring equal payments of principal and interest over a four-year term at an interest rate of approximately 12 percent (compounded annually). Assume that the highest applicable federal rate in effect at the time the partnership is formed is 10 percent compounded annually.

(ii) The transfer of money to be made to C under the partnership agreement is characterized by the parties as a guaranteed payment for capital and is determined without regard to the income of the partnership. The transfer is also reasonable within the meaning of § 1.707–4(a)(3). The transfer, therefore, is presumed to be a guaranteed payment for capital. The presumption set forth in paragraph (c) of § 1.707–3 (relating to transfers made within two years of each other) thus does not apply to this transfer. The transfer will not be treated as part of a sale of property to the partnership unless the facts and circumstances clearly establish that the transfer is not a guaranteed payment for capital and is part of a sale.

(iii) For the first four years of partnership operations, the total guaranteed payments made to C under the partnership agreement will equal $33,332. If the characterization of those payments as guaranteed payments for capital within the meaning of section 707(c) were respected, C would be allocated $24,499 of the deductions that would be claimed by the partnership for those payments, thereby leaving the balance in C's capital account approximately $25,000 less than it would have been if the guaranteed payments had not been made. As a result, the guaranteed payments would have the effect of offsetting approximately $25,000 of the credit made to C's capital account for the property transferred to the partnership by C. Moreover, a $25,000 loan requiring equal payments of principal and interest over a four-year term at an interest rate of 12 percent (compounded annually), would have resulted in annual payments of principal and interest of $8,230.86. Consequently, the guaranteed payments effectively place the partners in the same economic position that they would have been in had D purchased a one-quarter interest in the property transferred to the partnership by C. In view of the burden the guaranteed payments place on D's right to transfers of partnership cash flow and D's legal obligation to make contributions to the partnership to the extent necessary to fund the guaranteed payments, D has effectively purchased through the partnership a one-quarter interest in the property from C.

(iv) Under these facts, the presumption that the transfers to C are guaranteed payments for capital is rebutted, because the facts and circumstances clearly establish that the transfers are part of a sale and not guaranteed payments for capital. Under § 1.707–3(a), C and the partnership are treated as if C sold a one-quarter interest in the property to the partnership in exchange for a promissory note evidencing the partnership's obligation to make the guaranteed payments.

(b) *Presumption regarding operating cash flow distributions*—(1) *In general.* Notwithstanding the presumption set forth in paragraph (c) of § 1.707–3 (relating to transfers made within two years of each other), an operating cash flow distribution is presumed not to be part of a sale of property to the partnership unless the facts and circumstances clearly establish that the transfer is part of a sale.

(2) *Operating cash flow distributions*—(i) *In General.* One or more transfers of money by the partnership to a partner during a taxable year of the partnership are operating cash flow distributions for purposes of paragraph (b)(1) of this section to the extent that those transfers are not presumed to be guaranteed payments for capital under paragraph (a)(1)(ii) of this section, are not reasonable preferred returns within the meaning of paragraph (a)(3) of this section, are not characterized by the parties as distributions to the partner acting in a capacity other than a partner and do not exceed the product of the net cash flow of the partnership from operations for the year multiplied by the lesser of the partner's percentage interest in overall partnership profits for that year and the partner's percentage interest in overall partnership profits for the life of the partnership. For purposes of the preceding sentence, the net cash flow of the partnership from operations for a taxable year is an amount equal to the taxable income or loss of the partnership arising in the ordinary course of the partnership's business and investment activities, increased by depreciation, amortization, cost recovery allowances and other noncash charges deducted in determining such taxable income and decreased by—

(A) Principal payments made on any partnership indebtedness;

(B) Property replacement or contingency reserves actually established by the partnership;

(C) Capital expenditures when made from other than reserves; and

(D) Any other cash expenditures (including preferred returns) not deducted in determining such taxable income or loss.

In the case of tiered partnerships, the upper-tier partnership must take into account its share of the net cash flow from operations of the lower-tier partnership applying principles similar to those described in paragraph (b)(2) (i) of this section, so that the amount of the upper-tier partnership's operating cash flow distributions is neither overstated nor understated.

(ii) *Operating cash flow safe harbor.* For any taxable year, in determining a partner's operating cash flow distributions for the year, the partner may use the partner's smallest percentage interest under the terms of the partnership agreement in any material item of partnership income or gain that may be realized by the partnership in the three-year period beginning with such taxable year. This provision is merely intended to provide taxpayers with a safe harbor and is not intended to preclude a taxpayer from using a different percentage under the rules of paragraph (b)(2)(i) of this section.

(c) *Distributions within 75 days of year end.* For purposes of this section only, any distribution of money by the partnership to a partner within 75 days after the end of a taxable year may be treated as a distribution made on the last day of that taxable year.

(d) *Exception for reimbursements of preformation expenditures.* A transfer of money or other consideration by the partnership to a partner will not be treated as part of a sale of property by the partner to the partnership under paragraph (a) of § 1.707–3 (relating to treatment of transfers as a sale) to the extent that the transfer to the partner by the partnership is made to reimburse the partner for, and does not exceed the amount of, capital expenditures that—

(1) Are incurred during the one-year period preceding the transfer by the partner to the partnership, and

(2) Are incurred by the partner with respect to—

(i) Partnership organization and syndication costs described in section 709, or

(ii) Property contributed to the partnership by the partner, but only if the reimbursed capital expenditures do not exceed 20 percent of the fair market value of such property at the time of the contribution.

§ 1.707–5 Disguised sales of property to partnership; special rules relating to liabilities.

(a) *Liability assumed or taken subject to by partnership*—(1) *In general.* For purposes of this section and §§ 1.707–3 and –4, if a partnership assumes or takes property subject to a qualified liability (as defined in paragraph (a)(6) of this section) of a partner, the partnership is treated as transferring consideration to the partner only to the extent provided in paragraph (a)(5) of this section. By contrast, if the partnership assumes or takes property subject to a liability of the partner other than a qualified liability, the partnership is treated as transferring consideration to the partner to the extent that the amount of the liability exceeds the partner's share of that liability immediately after the partnership assumes or takes subject to the liability as provided in paragraph (a)(2), (3) and (4) of this section.

(2) *Partner's share of liability.* A partner's share of any liability of the partnership is deteremined under the following rules:

(i) *Liability defined.* A liability includes any obligation of a person that is considered a liability under general principles of Federal tax law without regard to the limitations provided in § 1.752–1T(g).

(ii) *Recourse liability.* A partner's share of a recourse liability of the partnership equals the partner's share of the liability under the rules of section 752 and the regulations thereunder. A partnership liability is a recourse liability to the extent that the obligation is a recourse liability under § 1.752–1T(d) or would be treated as a recourse liability under that section if it were treated as a partnership liability for purposes of that section.

(iii) *Nonrecourse liability*—(A) *In general.* A partner's share of a nonrecourse liability of the partnership equals the amount obtained by multiplying the outstanding balance of the liability (at the time the partnership takes property subject to such liability) by the partner's smallest percentage interest under the partnership agreement in any material item of income or gain that may be realized by the partnership for any taxable year from the property securing the payment of the liability. The partnership and the partners may disregard the smallest percentage and use another percentage under which the partnership agreement allocates income to the partner if it is reasonably expected that more of the net income (including gain) from the encumbered property will be realized by the partnership and allocated while that allocation percentage is in effect than while any other allocation percentage provided in the partnership agreement is in effect. For purposes of this paragraph—

(*1*) An allocation percentage will be disregarded if the allocation of income or gain under that percentage has little or no economic significance, and

(*2*) Two or more allocation percentages that do not vary significantly from one another will be treated as a single allocation percentage equal to the smallest of such percentages.

The determination of a partner's percentage interest in partnership net income (including gain) is made by taking into account the partner's distributive share of all partnership items (including guaranteed payments), but is made without regard to any allocation required under section 704(c) as a result of a contribution of property to the partnership or any allocation made in the same manner as under section 704(c) in connection with a revaluation of partnership property pursuant to § 1.704–1(b)(2)(iv) (*f*) or (*r*); any allocation required by a qualified income offset (within the meaning of § 1.704–1(b)(2)(ii) (*d*); or any allocation required pursuant to a minimum gain chargeback in accordance with § 1.704–1(b)(4)(iv)(*e*) or § 1.704–1T(b)(4)(iv) (*e*) or (*h*) (*4*). A partnership liability is a nonrecourse liability of the partnership to the extent that the obligation is a nonrecourse liability under § 1.752–1T(e) or would be a nonrecourse liability of the partnership under § 1.752–1T(e) if it were treated as a partnership liability for purposes of that section.

(B) *Disclosure of the use of a percentage other than that smallest percentage.* If a partner uses a percentage other than that partner's smallest percentage, the use of such percentage is to be disclosed to the Internal Revenue Service in accordance with § 1.707–8.

(3) *Reduction of partner's share of liability.* For purposes of this section, if—

(i) At the time that a partnership assumes or takes subject to a liability, it is anticipated that the transferring partner's share of the liability will be subsequently reduced, and

(ii) The reduction of the partner's share of the liability is part of a plan that has as one of its principal purposes minimizing the extent to which the assumption of or taking subject to the

liability is treated as part of a sale under § 1.707–3,

the partner's share of the liability, immediately after the assumption or taking subject to, is determined by taking into account such reduction.

(4) *Special rule applicable to transfers of encumbered property to a partnership by more than one partner pursuant to a plan.* For purposes of paragraph (a)(1) of this section, if the partnership assumes or takes property or properties subject to the liabilities of more than one partner pursuant to a plan, each partner's share of the liabilities assumed or taken subject to by the partnership pursuant to that plan immediately after the transfers equals the sum of the partner's shares of the respective liabilities (other than qualified liabilities as defined in paragraph (a)(6) of this section) assumed or taken subject to by the partnership pursuant to the plan. This paragraph (a)(4) does not apply to any liability assumed or taken subject to by the partnership with a principal purpose of reducing the extent to which any other liability assumed or taken subject to by the partnership is treated as a transfer of consideration under paragraph (a)(1) of this section.

(5) *Special rule applicable to qualified liabilities.* (1) If a transfer of property by a partner to a partnership is not otherwise treated as part of a sale, the partnership's assumption of or taking subject to a qualified liability in connection with a transfer of property will not be treated as part of a sale. If a transfer of property by a partner to the partnership is treated as part of a sale without regard to the partnership's assumption of or taking subject to a qualified liability (as defined in paragraph (a)(6) of this section) in connection with the transfer of property, the partnership's assumption of or taking subject to that liability is treated as a transfer of consideration made pursuant to a sale of such property to the partnership only to the extent of the lesser of—

(A) The amount of consideration that the partnership would be treated as transferring to the partner under paragraph (a)(1) of this section if the liability were not a qualified liability, or

(B) The amount obtained by multiplying the amount of the qualified liability by the partner's net equity percentage with respect to that property.

(ii) A partner's net equity percentage with respect to an item of property equals the percentage determined by dividing—

(A) The aggregate transfers of money or other consideration to the partner by the partnership (other than any transfer described in this paragraph (a)(5)) that are treated as proceeds realized from the sale of the transferred property, by

(B) The excess of the fair market value of the property at the time it is transferred to the partnership over any qualified liability encumbering the property or, in the case of any qualified liability described in paragraph (a)(6)(i) (C) or (D) of this section, that is properly allocable to the property.

(6) *Qualfied liability of a partner defined.* A liability assumed or taken subject to by a partnership in connection with a transfer of property to the partnership by a partner is a qualified liability of the partner only to the extent—

(i) It is either—

(A) A liability that was incurred by the partner more than two years prior to the earlier of the date the partner agrees in writing to transfer the property or the date the partner transfers the property to the partnership and that has encumbered the transferred property throughout that period;

(B) A liability that was not incurred in anticipation of the transfer of the property to a partnership, but that was incurred by the partner within the two-year period prior to the earlier of the date the partner agrees in writing to transfer the property or the date the partner transfers the property to the partnership and that has encumbered the transferred property since it was incurred (see paragraph (a)(7) of this section for further rules regarding a liability incurred within two years of a property transfer or of a written agreement to transfer);

(C) A liability that is allocable under the rules of § 1.163–8T to capital expenditures with respect to the property; or

(D) A liability that was incurred in the ordinary course of the trade or business in which property transferred to the partnership was used or held but only if substantially all of the assets used or held in such activity are transferred to the partnership, and

(ii) The amount of the liability does not exceed the fair market value of the transferred property (less any other liabilities that are senior in priority and that encumber such property or any allocable liabilities that are described in paragraph (a)(6)(i) (C) or (D) of this section) at the time of the transfer.

(7) *Liability incurred within two years of transfer presumed to be in anticipation of the transfer*—(i) *In general.* For purposes of this section, if within a two-year period a partner incurs a liability (other than a liability described in paragraph (a)(6)(i) (C) or (D) of this section) and transfers property to a partnership or agrees in writing to transfer the property, and in connection with the transfer the partnership assumes or takes the property subject to the liability, the liability is presumed to be incurred in anticipation of the transfer unless the facts and circumstances clearly establish that the liability was not incurred in anticipation of the transfer.

(ii) *Disclosure of transfers of property subject to liabilities incurred within two years of the transfer.* If a partner treats a liability assumed or taken subject to by a partnership as a qualified liability under paragraph (a)(6)(i) (B) of this section, such treatment is to be disclosed to the Internal Revenue Service in accordance with § 1.707–8.

(b) *Treatment of debt-financed transfers of consideration by partnerships*—(1) *In general.* For purposes of § 1.707–3, if—

(i) A partner transfers property to a partnership, and

(ii) The partnership incurs a liability and all or a portion of the proceeds of that liability are allocable under § 1.163–8T to a transfer of money or other consideration to the partner made within 90 days of incurring the liability,

the transfer of money or other consideration to the partner is taken into account only to the extent that the amount of money or the fair market value of the other consideration transferred exceeds that partner's allocable share of the partnership liability.

(2) *Partner's allocable share of liability*—(i) *In general.* A partner's allocable share of a partnership liability for purposes of paragraph (b)(1) of this section equals the amount obtained by multiplying the partner's share of the liability as described in paragraph (a)(2) of this section by the fraction determined by dividing—

(A) The portion of the liability that is allocable under § 1.163–8T to the money or other property transferred to the partner, by

(B) The total amount of the liability.

(ii) *Debt-financed transfers made pursuant to a plan.* If a partnership transfers to more than one partner pursuant to a plan all or a portion of the proceeds of one or more partnership liabilities, paragraph (b)(1) of this section is applied by treating all of the liabilities incurred pursuant to the plan as one liability, and each partner's allocable share of those liabilities equals the amount obtained by multiplying the sum of the partner's shares of each of the respective liabilities (as defined in paragraph (a)

(2) of this section) by the fraction obtained by dividing—

(A) The portion of those liabilities that is allocable under § 1.163–8T to the money or other consideration transferred to the partners pursuant to the plan, by

(B) The total amount of those liabilities.

This paragraph does not apply to any transfer of money or other property to a partner that is made with a principal purpose of reducing the extent to which any transfer is taken into account under paragraph (b)(1) of this section.

(iii) *Reduction of partner's share of liability.* For purposes of paragraph (b)(2) of this section, if—

(A) It is anticipated that a partner's share of a liability that is allocable to a transfer of money or other consideration to the partner will be reduced subsequent to the transfer, and

(B) The reduction of the partner's share of the liability is part of a plan that has as one of it principal purposes minimizing the extent to which the partnership's distribution of the proceeds of the borrowing is treated as part of a sale,

the partner's share of the liability, immediately after the transfer, will be determined by taking into account such reduction.

(c) *Refinancings.* To the extent that the proceeds of a partnership liability (the "refinancing debt") are allocable under the rules of § 1.163–8T to payments discharging all or part of any other partnership liability, the refinancing debt is treated as the other liability for purposes of applying the rules of this section.

(d) *Share of liability where assumption accompanied by transfer of money.* For purposes of § 1.707–3 through 1.707–5, if pursuant to a plan a partner pays or contributes money to the partnership and the partnership assumes or takes subject to one or more liabilities (other than qualified liabilities) of the partner, the amount of those liabilities that the partnership is treated as assuming or taking subject to is reduced (but not below zero) by the money transferred.

(e) *Examples.* The following examples illustrate the application of this section.

Example 1. Partnership's assumption of nonrecourse liability encumbering transferred property. (i) A and B form partnership AB which will engage in renting office space. A transfers $500,000 in cash to the partnership, and B transfers an office building to the partnership. At the time it is transferred to the partnership, the office building has a fair market value of $1,000,000, an adjusted basis of $400,000, and is encumbered by a $500,000 liability, which B incurred 12 months earlier to finance the acquisition of other property. No facts rebut the presumption that the liability was incurred in anticipation of the transfer of the property to the partnership. Assume that this liability is a nonrecourse liability of the partnership within the meaning of section 752 and the regulations thereunder. The partnership agreement provides that, except as otherwise required by its minimum gain chargeback provision or section 704(c), (1) A will receive a preferential distribution of cash flow from the partnership equal to 8 percent of A's capital contribution for the first 2 years with a corresponding allocation of partnership net income and gain as necessary and as soon as available to support A's cash flow preference; and (2) all further partnership items will be allocated equally between A and B. The partnership agreement complies with the requirements of § 1.704–1 (b)(2)(ii)(*b*). Assume that it is reasonably expected that more of the net income (including gain) from the office building will be realized by the partnership and allocated during the period in which partnership items will be allocated equally between A and B than during the period in which A will receive an allocation of income or gain to support A's cash flow preference.

(ii) The nonrecourse liability secured by the office building is not a qualified liability within the meaning of paragraph (a)(6) of this section. Accordingly, immediately after the partnership's assumption of that liability, B's share of the liability equals the amount obtained by multiplying the outstanding balance of the liability by B's smallest percentage interest under the partnership agreement in any material item of income or gain that may be realized by the partnership for any taxable year from the property security the payment of the liability. B may disregard the smallest percentage, however, and use another percentage that allocates income to B and is provided in the partnership agreement if it is reasonably expected that more of the net income (including net gain) from the property will be realized by the partnership and allocated while that allocation percentage is in effect than while any other allocation percentage is in effect.

(iii) B's smallest percentage interest in any material item of income and gain from the project is zero determined as follows. Partnership net income and gain is allocated first to A in order to support A's 8 percent cash flow preference that is payable in the first 2 years. Because the income that will be allocated to A under this preference is material and none of his income will be allocated to B, B's percentage interest in such income is zero. In this case, however, B's smallest percentage interest may be disregarded and B may use the 50 percent allocation provided in the partnership agreement, because the facts indicate that it is resonably expected that more of the net income and net gain from the property will be realized by the partnership and allocated while the 50 percent allocation is in effect than while any other allocation percentage included in the partnership agreement is in effect.

(iv) In this event, immediately after the partnership takes the office building subject to the nonrecourse liability, B's share of that liability equals $250,000 (the amount obtained by multiplying the outstanding balance of that liability ($500,000) by 50 percent). The partnerhsip's taking subject to the liability encumbering the office building is treated as a transfer of $250,000 of consideration to B (the amount by which the liability ($500,000) exceeds B's share of that liability immediately after taking subject to ($250,000)). B is treated as having sold $250,000 of the fair market value of the office building to the partnership in exchange for the partnership's taking subject to a $250,000 liability. This results in a gain of $150,000 ($250,000 minus ($250,000/$1,000,000 multiplied by $400,000)).

Example 2. Partnership's assumption of recourse liability encumbering transferred property. (i) C transfers property Y to a partnership. At the time of its transfer to the partnership, property Y has a fair market value of $10,000,000 and is subject to an $8,000,000 liability that C incurred, immediately before transferring property Y to the partnership, in order to finance other expenditures. Upon the transfer of property Y to the partnership, the partnership assumed the liability encumbering that property. The partnership assumed this liability soley to acquire property Y. Assume that under section 752 and the regulations thereunder, immediately after the partnership's assumption of the liability encumbering property Y, the liability is a recourse liability of the partnership and C's share of that liability is $7,000,000.

(ii) Under the facts of this example, the liability encumbering property Y is not a qulified liability. Accordingly, the partnership's assumption of the liability results in a transfer of consideration to C in connection with C's transfer of property Y to the partnership in the amount of $1,000,000 (the excess of the liability assumed by the partnership ($8,000,000) over C's share of the liability immediately after the assumption ($7,000,000)). See paragraph (a) (1) and (2) of this section.

Example 3. Subsequent reduction of transferring partner's share of liability. (i) The facts are the same as in *Example 2.* Assume that property Y is a fully leased office building, that the rental income from property Y is sufficient to meet debt service and that the remaining term of the liability is ten years. It is anticipated that, three years after the partnership's assumption of the liability, C's share of the liability under section 752 will be reduced to zero because of a shift in the allocation of partnership losses pursuant to the terms of the partnership agreement. Under the partnership agreement, this shift in the allocation of partnership losses is dependent solely on the passage of time.

(ii) Under paragraph (a)(3) of this section, if (A) the reduction in C's share of the liability was anticipated at the time of C's transfer, and (B) the reduction was part of a plan that has as one of its principal purposes minimizing the extent of sale treatment under § 1.707–3 (*i.e.*, a principal purpose of

allocating a large percentage of losses to C in the first three years when losses were not likely to be realized was to minimize the extent to which C's transfer would be treated as part of a sale), C's share of the liability immediately after the assumption is treated as equal to C's reduced share.

Example 4. Partnership's assumption of a qualified liability as sole consideration. (i) D transfers property Z to a partnership. At the time of its transfer to the partnership, property Z has a fair market value of $165,000 and an adjusted tax basis of $75,000. Also, at the time of the transfer, property Z is subject to a $75,000 liability that D incurred more than two years before transferring property Z to the partnership. The liability has been secured by property Z since it was incurred by D. Upon the transfer of property Z to the partnership, the partnership assumed the liability encumbering that property. The partnership made no other transfers to D in consideration for the transfer of property Z to the partnership. Assume that, under section 752 and the regulations thereunder, immediately after the partnership's assumption of the liability encumbering property Z, the liability is a recourse liability of the partnership and D's share of that liability is $25,000.

(ii) The $75,000 liability secured by property Z is a qualified liability of D because D incurred the liability more than two years prior to the assumption of the liability by the partnership and the liability has encumbered property Z for more than two years prior to that assumption. See paragraph (a)(6) of this section. Therefore, since no other transfer to D was made as consideration for the transfer of property Z, under paragraph (a)(5) of this section, the partnership's assumption of the qualified liability of D encumbering property Z is not treated as part of a sale.

Example 5. Partnership's assumption of a qualified liability in addition to other consideration. (i) The facts are the same as in *Example 4*, except that the partnership makes a transfer to D of $30,000 in money that is consideration for D's transfer of property Z to the partnership under § 1.707–3.

(ii) As in *Example 4*, the $75,000 liability secured by property Z is a qualified liability of D. Since the partnership transferred $30,000 to D in addition to assuming the qualified liability under paragraph (a)(5) of this section, the partnership's assumption of this qualified liability is treated as a transfer of additional consideration to D to the extent of the lesser of (A) the amount that the partnership would be treated as transferring to D if the liability were not a qualified liability ($50,000 (*i.e.*, the excess of the $75,000 qualified liability over D's $25,000 share of that liability)) or (B) the amount obtained by multiplying the qualified liability ($75,000) by D's net equity percentage with respect to property Z (one-third). D's net equity percentage with respect to property Z equals the fraction determined by dividing (*1*) the aggregate amount of money or other consideration (other than the qualified liability) transferred to D and treated as part of a sale of property Z under § 1.707–3(a) ($30,000 transfer of money) by (*2*) D's net equity in property Z ($90,000 (*i.e.*, the excess of the $165,000 fair market value over the $75,000 qualified liability)). Accordingly, the partnership's assumption of the qualified liability of D encumbering property Z is treated as a transfer of $25,000 (one-third of $75,000) of consideration to D pursuant to a sale. Therefore, D is treated as having sold $55,000 of the fair market value of property Z to the partnership in exchange for $30,000 in money and the partnership's assumption of $25,000 of the qualified liability. Accordingly, D must recognize $30,000 of gain on the sale (the excess of the $55,000 amount realized over $25,000 of D's adjusted basis for property Z (*i.e.*, one-third of D's adjusted basis for the property, because D is treated as having sold one-third of the property to the partnership)).

Example 6. Partnership's assumptions of liabilities encumbering properties transferred pursuant to a plan. (i) Pursuant to a plan, E and F transfer property 1 and property 2, respectively, to an existing partnership in exchange for interests in the partnership. At the time the properties are transferred to the partnership, property 1 has a fair market value of $10,000 and an adjusted tax basis of $6,000, and property 2 has a fair market value of $10,000 and an adjusted tax basis of $4,000. At the time properties 1 and 2 are transferred to the partnership, a $6,000 nonrecourse liability ("liability 1") is secured by property 1 and a $7,000 recourse liability of F ("liability 2") is secured by property 2. Properties 1 and 2 are transferred to the partnership, and the partnership takes subject to liability 1 and assumes liability 2. E and F incurred liabilities 1 and 2 immediately prior to transferring properties 1 and 2 to the partnership and used the proceeds for personal expenditures. The liabilities are not qualified liabilities. Assume that E and F are each allocated $2,000 of liability 1 in accordance with § 1.707–5(a)(2)(iii) (which determines a partner's share of a nonrecourse liability). Assume further that E's share of liability 2 is $3,500 and F's share is $0 in accordance with § 1.707–5 (a)(2)(ii) (which determines a partner's share of a recourse liability).

(ii) E and F transferred properties 1 and 2 to the partnership pursuant to a plan. Accordingly, the partnership's taking subject to liability 1 is treated as a transfer of only $500 of consideration to E (the amount by which liability 1 ($6,000) exceeds E's share of liabilities 1 and 2 ($5,500)), and the partnership's assumption of liability 2 is treated as a transfer of only $5,000 of consideration to F (the amount by which liability 2 ($7,000) exceeds F's share of liabilities 1 and 2 ($2,000)). E is treated under the rule in § 1.707–3 as having sold $500 of the fair market value of property 1 in exchange for the partnership's taking subject to liability 1 and F is treated as having sold $5,000 of the fair market value of property 2 in exchange for the assumption of liability 2.

Example 7. Partnership's assumption of liability pursuant to a plan to avoid sale treatment of partnership assumption of another liability. (i) The facts are the same as in *Example 6*, except that (A) F transferred the proceeds of liability 2 to the partnership, and (B) F incurred liability 2 in an attempt to reduce the extent to which the partnership's taking subject to liability 1 would be treated as a transfer of consideration to E (and thereby reduce the portion of E's transfer of property 1 to the partnership that would be treated as part of a sale).

(ii) Because the partnership assumed liability 2 with a principal purpose of reducing the extent to which the partnership's taking subject to liability 1 would be treated as a transfer of consideration to E, liability 2 is ignored in applying paragraph (a)(3) of this section. Accordingly, the partnership's taking subject to liability 1 is treated as a transfer of $4,000 of consideration to E (the amount by which liability 1 ($6,000) exceeds E's share of liability 1 ($2,000)). On the other hand, the partnership's assumption of liability 2 is not treated as a transfer of any consideration to F because F's share of that liability equals $7,000 as result F's transfer of $7,000 in money to the partnership.

Example 8. Treatment of debt-financed transfer of consideration by partnership. (i) G transfers property Z to partnership GH in exchange for an interest therein on April 9, 1992. On September 13, 1992, the partnership incurs a liability of $20,000. On November 17, 1992, the partnership transfers $20,000 to G, and $10,000 of this transfer is allocable under the rules of § 1.163–8T to proceeds of the partnership liability incurred on September 13, 1992. The remaining $10,000 is paid from other partnership funds. Assume that, under section 752 and the corresponding regulations, the $20,000 liability incurred on September 13, 1992, is a recourse liability of the partnership and G's share of that liability is $10,000 on November 17, 1992.

(ii) Because a portion of the transfer made to G on November 17, 1992, is allocable under § 1.163–8T to proceeds of a partnership liability that was incurred by the partnership within 90 days of that transfer, G is required to take the transfer into account in applying the rules of this section and § 1.707–3 only to the extent that the amount of the transfer exceeds G's allocable share of the liability used to fund the transfer. G's allocable share of the $20,000 liability used to fund $10,000 of the transfer to G is $5,000 (G's share of the liability ($10,000) multiplied by the fraction obtained by dividing (A) the amount of the liability that is allocable to the distribution to G ($10,000), by (B) the total amount of such liability ($20,000)). Therefore, G is required to take into account only $15,000 of the $20,000 partnership transfer to G for purposes of this section and § 1.707–3. Under these facts, this $15,000 transfer will be treated under the rule in § 1.707–3 as part of a sale by G of property Z to the partnership.

§ 1.707–6 Disguised sales of property by partnership to partner; general rules.

(a) *In general.* Rules similar to those provided in § 1.707–3 will apply in determining whether a transfer of property by a partnership to a partner and one or more transfers of money or other consideration by that partner to the partnership will be treated as a sale of property, in whole or in part, to the partner.

(b) *Special rules relating to liabilities*—(1) *In general.* Rules similar to those provided in § 1.707–5 will apply to determine the extent to which an assumption of or taking subject to a liability by a partner, in connection with a transfer of property by a partnership, will be considered part of a sale. Accordingly, if a partner assumes or takes property subject to a qualified liability (as defined in paragraph (b)(2) of this section) of a partnership, the partner is treated as transferring consideration to the partnership only to the extent provided in this paragraph (b). If the partner assumes or takes subject to a liability that is not a qualified liability, the amount treated as consideration transferred to the partnership is the amount that the liability assumed or taken subject to by the partner exceeds the partner's share of that liability (determined under the rules of § 1.707–5(a)(2)) immediately before the transfer. Similar to the rules provided in § 1.707–5(a)(4), if more than one partner assumes or takes subject to a liability pursuant to a plan, the amount that is treated as a transfer of consideration by each partner is the amount by which all of the liabilities (other than qualified liabilities) assumed or taken subject to by the partner pursuant to the plan exceed the partner's share of all of those liabilities immediately before the assumption or taking subject to. This paragraph (b)(1) does not apply to any liability assumed or taken subject to by a partner with a principal purpose of reducing the extent to which any other liability assumed or taken subject to by a partner is treated as a transfer of consideration under paragraph (b) of this section.

(2) *Qualified liabilities.* (i) If a transfer of property by a partnership to a partner is not otherwise treated as part of a sale, the partner's assumption of or taking subject to a qualified liability encumbering that property will not be treated as part of a sale. If a transfer of property by a partnership to the partner is treated as part of a sale without regard to the partner's assumption of or taking subject to a qualified liability secured by the property, the partner's assumption of or taking subject to that liability is treated as a transfer of consideration made pursuant to a sale of such property to the partner only to the extent of the lesser of—

(*A*) The amount of consideration that the partner would be treated as transferring to the partnership under paragraph (b) of this section if the liability were not a qualified liability, or

(*B*) The amount obtained by multiplying the amount of the liability at the time of its assumption or taking subject to by the partnership's net equity percentage with respect to that property.

(ii) A partnership's net equity percentage with respect to an item of property encumbered by a qualified liability equals the percentage determined by dividing—

(A) The aggregate transfers to the partnership from the partner (other than any transfer described in this paragraph (b)(2)) that are treated as the proceeds realized from the sale of the transferred property to the partner, by

(B) The excess of the fair market value of the property at the time it is transferred to the partner over any qualified liabilities of the partnership that are secured by the property at that time.

(iii) For purposes of this section, the definition of a qualified liability is that provided in § 1.707–5(a)(6) except that, in applying the definition, the qualified liability is one that is originally an obligation of the partnership and is assumed or taken subject to by the partner in connection with a transfer of property to the partner.

(c) *Disclosure rules.* Similar to the rules provided in §§ 1.707–3 (c) (2), 1.707–5 (a) (2) (iii) (B) and 1.707–5 (a) (7) (ii), a partnership is to disclose to the Internal Revenue Service, in accordance with § 1.707–8, the facts in the following circumstances:

(1) When a partnership transfers property to a partner and the partner transfers money or other consideration to the partnership within a two-year period (without regard to the order to the transfers) and the partnership treats the transfers as other than a sale for tax purposes;

(2) When a partner assumes or takes subject to a liability of a partnership in connection with a transfer of property by the partnership to the partner, and the liability is a nonrecourse liability, and the partnership uses an allocation percentage other than that partner's smallest percentage interest (within the meaning of § 1.707–5 (a) (2) (iii) (A)) to determine the partner's share of the liability; and

(3) When a partner assumes or takes subject to a liability of a partnership in connection with a transfer of property by the partnership to the partner, and the partnership incurred the liability within the two-year period prior to the earlier of the date the partnership agrees in writing to the transfer of property or the date the partnership transfers the property, and the partnership treats the liability as a qualified liability under rules similar to § 1.707–5 (a) (6) (i) (B).

(d) *Examples.* The following examples illustrate the rules of this section.

Example 1. Sale of property by partnership to partner. (i) A is a member of a partnership. The partnership transfers property X to A. At the time of the transfer, property X has a fair market value of $1,000,000. One year after the transfer, A transfers $1,100,000 to the partnership. Assume that under the rules of section 1274 the imputed principal amount of an obligation to transfer $1,100,000 one year after the transfer of property X is $1,000,000 on the date of the transfer.

(ii) Since the transfer of $1 100,000 to the partnership by A is made within two years of the transfer of property X to A, under rules similar to those provided in § 1.707–3 (c), the transfers are presumed to be a sale unless the facts and circumstances clearly establish otherwise. If no facts exist that would rebut this presumption, on the date that the partnership transfers property X to A, the partnership is treated as having sold property X to A in exchange for A's obligation to transfer $1,100,000 to the partnership one year later.

Example 2. Assumption of liability by partner. (i) B is a member of an existing partnership. The partnership transfers property Y to B. On the date of the transfer, property Y has a fair market value of $1,000,000 and is encumbered by a nonrecourse liability of $600,000. B takes the property subject to the liability. The partnership incurred the nonrecourse liability six months prior to the transfer of property Y to B and used the proceeds to purchase an unrelated asset. B uses the predominant-share approach to determine B's share of the liability. Under that rule, B's share of the liability immediately before the transfer of property Y was $100,000.

(ii) The liability is not allocable under the rules of § 1.163–8T to capital expenditures with respect to the property transferred to B and was not incurred in the ordinary course of the trade or business in which the property transferred to the partner was used or held. Since the partnership incurred the nonrecourse liabillity within two years of the transfer to B, under rules similar to those provided in § 1.707–5(a)(5), the liability is presumed to be incurred in anticipation of the transfer unless the facts and circumstances clearly establish the contrary. Assuming no facts exist to rebut this presumption, the liability taken subject to by B is not a qualified liability. The partnership is treated as having received, on the date of the transfer of property Y to B, $500,000 ($600,000 liability assumed by B less B's share of the $100,000 liability immediately prior to the transfer) as consideration for the sale of one-half ($500,000/$1,000,000) of property Y to B. The partnership is also treated as having distributed to B, in B's capacity as a partner, the other one-half of property Y.

§ 1.707–7 Disguised sales of partnership interests. [Reserved.]

§ 1.707–8 Disclosure of certain information.

(a) *In general.* The disclosure referred to in § 1.707–3 (c) 2) (regarding certain

transfers made within two years of each other), § 1.707–5 (a) (2) (iii) (B) (regarding the use of a percentage other than the partner's smallest percentage interest in any material item of income or gain from property to determine the partner's share of a nonrecourse liability), § 1.707–5 (a) (7) (ii) (regarding a liability incurred within two years prior to a transfer of property), and § 1.707–6 (c) (relating to transfers of property from a partnership to a partner in situations analogous to those listed above) is to be made in the following manner.

(b) *Method of providing disclosure.* Disclosure is to be made on a completed Form 8275 or on a statement attached to the return of the transferor of property for the taxable year of the transfer that include the following:

(1) A caption identifying the statement as disclosure under section 707;

(2) An identification of the item (or group of items) with respect to which disclosure is made;

(3) The amount of each item; and

(4) The facts affecting the potential tax treatment of the item (or items) under section 707.

§ 1.707–9 Effective dates and transitional rules.

(a) *Sections 1.707–3 through 1.707–6—*(1) *In general.* Except as provided in paragraph (a) (3) of this section, sections 1.707–3, –4, –5, and –6 apply to any transaction with respect to which all transfers that are part of a sale of an item of property occur after April 24, 1991.

(2) Transfers occurring on or before April 24, 1991. Except as otherwise provided in paragraph (a) (3) of this section, in the case of any transaction with respect to which one or more of the transfers occurs on or before April 24, 1991, the determination of whether the transaction is a disguised sale of property (including a partnerhip interest) under section 707 (a) (2) is to be made on the basis of the statute and the guidance provided regarding that provision in the legislative history of section 73 of the Tax Reform Act of 1984 (Pub. L. 98–369). See H.R. Rep. No. 861, 98th Cong., 2d Sess. 859–62 (1984); S. Prt. No. 169 (Vol. (i), 98th Cong., 2d Sess. 223–32 (1984); H.R. Rep. No. 432 (Pt. 2), 98th Cong., 2d Sess. 1216–21 (1984).

(3) *Effective date of section 73 of the Tax Reform Act of 1984.* Sections 1.707–3 through 1.707–6 shall not apply to any transfer of money or other consideration to which section 73 (a) of the Tax Reform Act of 1984 (Pub. L. 98–369) does not apply pursuant to section 73 (b) of that Act.

(b) *Section 1.707–8 Disclosure of certain information.* The disclosure provisions described in § 1.707–8 will apply to transaction occurring after the date of publication of the final regulations in the **Federal Register**.

Fred T. Goldberg,

Commissioner of Internal Revenue.

[FR Doc. 91–9647 Filed 4–24–91; 8:45 am]

BILLING CODE 4830–01–M

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26 CFR Part 1

[PS–163–84]

RIN 1545–AH22

Treatment of Transaction Between Partners and Partnerships; Public Hearing on Proposed Regulations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of public hearing on proposed regulations.

SUMMARY: This document provides notice of a public hearing on proposed regulations relating to the treatment of transactions between partners and partnerships and, in some instances, between partners themselves, under section 707 of the Internal Revenue Code. Changes to the applicable law were made by the Tax Reform Act of 1984. The proposed regulations affect partnerships and their partners, and are necessary to provide them with guidance needed to comply with the applicable tax law.

DATES: The public hearing will be held on Monday, September 23, 1991, beginning at 10 a.m. Requests to speak and outlines of oral comments must be received by Monday, September 9, 1991.

ADDRESSES: The public hearing will be held in the Internal Revenue Service Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Requests to speak and outlines of oral comments should be submitted to the Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R [PS–163–84], room 4429, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert Boyer of the Regulations Unit, Assistant Chief Counsel (Corporate), 202–566–3935, (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is a notice of proposed rulemaking that proposes to add new regulations §§ 1.707–0 and 1.707–2 through 1.707–9 to part 1 of title 26 of the Code of Federal Regulations. No change to existing § 1.707–1 is proposed. These proposed regulations appear in the proposed rules section of this issue of the **Federal Register**.

The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR part 601) shall apply with respect to the public hearing. Persons who have submitted written comments within the time prescribed in the notice of proposed rulemaking and who also desire to present oral comments at the hearing on the proposed regulations should submit not later than Monday, September 9, 1991, an outline of the oral comments/testimony to be presented at the hearing and the time they wish to devote to each subject.

Each speaker (or group of speakers representing a single entity) will be limited to 10 minutes for an oral presentation exclusive of the time consumed by the questions from the panel for the government and answers to these questions.

Because of controlled access restrictions, attendees cannot be admitted beyond the lobby of the Internal Revenue Building until 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the persons testifying. Copies of the agenda will be available free of charge at the hearing.

By the Direction of the Commissioner of Internal Revenue:

Dale D. Goode,

Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 91–9660 Filed 4–24–91; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 412

[BPD–681–N]

RIN 0938–AE59

Medicare Program; Prospective Payment System for Inpatient Hospital Capital-Related Costs—Extension of Comment Period

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Extension of comment period.

SUMMARY: This notice extends the public comment period for the document in which we proposed to revise the Medicare payment methodology for inpatient hospital capital-related costs for hospitals paid under the prospective payment system.

DATES: Comment period extended to 5 p.m. eastern daylight time on May 14, 1991.

FOR FURTHER INFORMATION CONTACT: Larry Bonander, (301) 966–9019.

SUPPLEMENTARY INFORMATION: Section 1886(g)(1) of the Act requires that the inpatient hospital capital-related costs for hospitals paid under the prospective payment system for operating costs be paid under a prospective payment system effective with cost reporting periods beginning on or after October 1, 1991. To implement section 1886(g)(1) of the Act, we published a proposed rule concerning a prospective payment system for inpatient hospital capital-related costs on February 28, 1991 (56 FR 8476). We announced that the public comment period for that proposed rule would close at 5 p.m. eastern daylight time on April 29, 1991. Because a number of hospitals have requested more time to analyze the potential consequences of this proposed rule, we have decided to extend the public comment period to 5 p.m. eastern daylight time on May 14, 1991.

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance, Insurance Program)

Dated: April 18, 1991.

Gail R. Wilensky,

Administrator, Health Care Financing Administration.

Approved: April 19, 1991.

Louis W. Sullivan,

Secretary.

[FR Doc. 91–9834 Filed 4–22–91; 4:16 pm]

BILLING CODE 4120–01–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 91–113, RM–7643]

Television Broadcasting Services; Norwalk and Los Angeles, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed on behalf of Fidelity Television, Inc., licensee of Station KCAL–TV, Channel 9, Norwalk, California, seeking to change the community of license for VHF television Channel 9 from Norwalk to Los Angeles, California, and to modify its license accordingly. Coordinates used for this proposal are 34–13–38 and 118–04–00.

DATES: Comments must be filed on or before June 10, 1991, and reply comments on or before June 25, 1991.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Richard E. Wiley, John C. Quale and Jerry V. Haines, Esqs., Wiley, Rein & Fielding, 1776 K Street, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's notice of proposed rule making, MM Docket No. 91–113, adopted April 8, 1991, and released April 19, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center (202) 452–1422, 1714 21st St. NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a notice of proposed rule making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television broadcasting.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–9694 Filed 4–24–91; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 90–285; RM–7235]

Radio Broadcasting Services; Hannibal, OH

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal of.

SUMMARY: The Commission denies the request of Seven Ranges Radio Company, Inc., to allot Channel 258A to Hannibal, Ohio, as its first local FM service. The Commission found that Hannibal does not qualify as a "community" for allotment purposes. With this action, this proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 90–285, adopted April 8, 1991, and released April 19, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230) 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center (202) 452–1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–9695 Filed 4–24–91; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 9–114, RM–7457]

Radio Broadcasting Services; Othello, East Wenatchee, and Cashmere, WA and Wallace, ID

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by P–N–P Broadcasting, Inc., seeking the substitution of Channel 248C1 for Channel 248C2 at Othello, Washington, and the modification of the construction permit of Station KZLN–FM to specify operation on the higher powered channel. The petitioner also seeks the modification of the license of Station KYSN to specify operation on Channel 266A in lieu of Channel 249A at East Wenatchee, Washington; the substitution of Channel 294A for the vacant, but applied for, Channel 266A at Cashmere, Washington, and the modification of the construction permit for Channel 266A accordingly; and the

downgrade of the vacant and unapplied for Channel 248C at Wallace, Idaho, to Channel 248C2. See Supplemental Information, infra.

DATES: Comments must be filed on June 10, 1991, reply comment on or before June 25, 1991.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the following: Duane J. Polich, President, P–N–P Broadcasting, Ind., P.O. Box 2869, Othello, Washington, 99044–2869 (Petitioner); and Edward B. Cohen, Esq., 1752 N Street, NW., #800, Washington, DC 20036 (Counsel to Station KSYN).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's notice of proposed rule making, MM Docket No. 91–114, adopted April 5, 1991, and released April 19, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center (202) 452–1422, 1714 21st Street, NW., Washington, DC 20036.

Channel 248C1 can be allotted to Othello in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.0 kilometers (8.7 miles) southwest to avoid a short-spacing to the proposed allotment at Davenport, Washingotn, at coordinates North Latitude 46–45–28 and West Longitude 119–19–10. Channel 266A can be allotted to East Wenatehee in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.1 kilometers (2.6 miles) south to avoid a short-spacing to Station KEYF(FM), Channel 266C, Cheney, Washington, at coordinates North Latitude 47–22–52 and West Longitude 120–17–16. Channel 294A can be allotted to Cashmere in compliance with the Commission's minimum distance requirements with a site restriction of 4.2 kilometers (2.6 miles) west to avoid a short-spacing to Station KKNW, Channel 295C1, Bremerton, Washington, at coordinates North Latitude 47–30–35 and West Longitude 120–31–24. Channel 248C can be downgraded to Channel 248C2 at Wallace in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.3 kilometers (0.8 miles) northeast to avoid a short-spacing to Station KISC, Channel 251C, Spokane, Washington, at coordinates North Latitude 47–28–40 and West Longitude 115–54–38. Canadian concurrence is required since Othello, East Wenatchee, Cashmere and Wallace are located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with § 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 248C1 at Othello or require the petitioner to demonstrate the availability of an additional equivalent class channel.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a notice of proposed rule making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–9693 Filed 4–24–91; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Findings and Commencement of Status Reviews for a Petition to List the Steller's and Spectacled Eiders as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition findings.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces 90-day findings for a petition to add the Steller's eider (*Polysticta stelleri*) and the spectacled eider (*Somateria fisheri*) to the List of Threatened and Endangered Wildlife. The Service finds that the petition presents substantial information indicating that the requested action may be warranted. Through issuance of this notice, the Service is commencing a formal review of the status of these species.

DATES: The finding announced in this notice was made March 6, 1991. Comments and materials related to this petition finding may be submitted to the Field Supervisor at the address listed below until further notice.

ADDRESSES: Information, comments, or questions concerning the Steller's and spectacled eider petition may be submitted to the Field Supervisor, Ecological Services Anchorage Field Office, U.S. Fish and Wildlife Service, 605 W. 4th Avenue, room G–62, Anchorage, Alaska, 99501. The petition, finding, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: David E. McGillivary (907/271–2888 or FTS 868–2888) at the above address.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act (Act) (16 U.S.C. 1531–1544), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the **Federal Register.**

On December 10, 1990, the Fish and Wildlife Service received a petition from Mr. James G. King to list the Steller's eider (*Polysticta stelleri*) and spectacled eider (*Somateria fischeri*) as endangered species. Mr. King submitted biological, distributional, and historical information, and cited several scientific articles in support of the petition. The petition describes these species as imperiled because of potential significant reductions in population over the past several decades and potential threats throughout their ranges.

Compared to more heavily hunted and widespread species of North American waterfowl, relatively little emphasis has been placed on tracking the population status of Steller's and spectacled eiders. Their distributions generally do not coincide with standardized surveys directed toward other species. With the exception of data collected for spectacled eiders on the Yukon Delta National Wildlife Refuge (Yukon Delta) and winter surveys for Steller's eiders on the Alaska Peninsula, information regarding the populations and

distribution of these species is chiefly from historical and incidental observations.

The center of nesting for Steller's eider is the Siberian arctic. In Alaska, the Steller's eider primarily nested along the coast of the Yukon Delta and near Barrow, Alaska. An historical account from 1924 indicates that Steller's eiders were locally "common" on the Yukon Delta, although relatively few nesting records have been documented there. In recent years, three nests were found during waterfowl investigations in 1969, and the last recorded nesting on the Yukon Delta was of a single nest in 1975.

No population estimate is available for Steller's eiders nesting near Barrow. Historical accounts beginning over 100 years ago suggest that the species was a rare, but regular, nester in the Barrow area. A total of 17 nests were recorded between 1975 and 1980, but no nests have been reported over the last decade.

The majority of the world's population of Steller's eider winters along the north side of the Alaska Peninsula. Banding data collected since 1961 shows that the majority of Steller's eiders wintering in Alaska are from Siberia, and winter survey data collected over the past 16 years show a decline of over 50 percent in the number of wintering birds. This coincides with nesting population declines reported in Siberia, where the species is now considered rare (Solomonov, N.G. 1987. Red Book of the Yakutsk Autonomous Republic. Nauka Publ., Novisibirsk, USSR. Transl. A. Crow, 1990, Anchorage).

The Yukon Delta coast is the world's primary breeding location for the spectacled eider, and it apparently nests in low numbers across the arctic coastal plain. In the remainder of coastal Alaska, north and east of the Yukon Delta, the species is considered a rare nester. Nesting concentrations also occur along the northern coast of Siberia.

It is estimated that the Yukon Delta supported between 50,000 and 70,000 pairs of nesting spectacled eiders during the early 1970's. Since then, an estimated yearly decline of 13 percent has been reported, resulting in a total decline of approximately 94 percent. Although based on relatively few study plots on the Yukon Delta, these estimates correspond to the results of greater than 30 years of aerial breeding-pair surveys in western Alaska.

The wintering locations of the spectacled eider are unknown, although it is suspected that the population winters off shore in the Bering Sea along the edge of the pack ice. Lacking this essential knowledge, no survey of wintering spectacled eiders has been accomplished.

Although the causes of these population declines are not known, potential threats to both eider species include: Increased predation, habitat loss, oil pollution, subsistence hunting, industrial pollution, fish-net mortalities, and changes in marine ecology.

Based on the best scientific and commercial information currently available, the Service finds that the petition to list the Steller's and spectacled eiders presents substantial information indicating that the requested action may be warranted.

Author

The primary author of this notice is Brian Anderson (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Export, Imports, Reporting and recordkeeping requirements, and Transportation.

Authority: 16 U.S.C. 1531–1544.

Dated: April 12, 1991.

Bruce Blanchard,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 91–9785 Filed 4–24–91; 8:45 am]

BILLING CODE 4310–55–M

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50 CFR Part 36

RIN 1018–AB46

Regulations for the Management of Cabins on National Wildlife Refuges in Alaska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule clarifies, updates and modifies existing regulations on the management of cabins on National Wildlife Refuges in Alaska. These regulations are necessary in order to comply with the National Wildlife Refuge Administration Act of 1966 and the Alaska National Interest Lands Conservation Act of 1980 concerning the administration of cabins on Alaskan refuges. This proposal is being made to ensure proper and uniform management of all cabins on National Wildlife Refuges in Alaska.

DATES: Comments on these proposed regulations should be received by June 24, 1991.

ADDRESSES: Comments should be sent to Daryle Lons at the address below.

FOR FURTHER INFORMATION CONTACT: Daryle Lons, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503; telephone (907) 786–3361.

SUPPLEMENTARY INFORMATION:

Background

Sections 1303 and 1315 of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3193; 3203–3204) allow the Secretary of the Interior to permit cabins in National Wildlife Refuges in Alaska under certain conditions. Section 304 of ANILCA reemphasizes the authority of the Secretary to prescribe such regulations as necessary to ensure the compatibility of uses with refuge purposes.

The original cabin policy for the U.S. Fish and Wildlife Service (Service) was developed in 1981 and revised in 1984. This policy was the basis for regulations printed in the Code of Federal Regulations title 50. In September 1987, the Service, believing revisions of the existing cabin policy and regulations were needed, published a Draft Cabin Management Policy for cabins on National Wildlife Refuges in Alaska. Comments and suggestions on the draft policy were solicited during a 60-day public review period.

Because of the number and nature of comments received during the public review of the draft policy, the Service made such extensive revisions that a revised draft of the cabin management policy was published in December 1988, to give the public another opportunity to comment before the policy was made final.

The revised draft was completely reorganized, more clearly describing the objectives of the policy, and setting forth the guidelines needed to comply with the Alaska National Interest Lands Conservation Act of 1980 and the National Wildlife Refuge System Administration Act of 1966. The comment period for the revised draft was also 60 days. The final cabin policy was issued in August, 1989.

The purpose of the cabin policy is to provide uniform guidance to both the public and refuge managers on human use and occupancy of cabins located on National Wildlife Refuges in Alaska. The policy further serves to define under what conditions use and occupancy of a cabin may be compatible with the purposes for which the refuge was established. Compatibility with refuge purposes is implicit in all cabin management decisions.

The next step in the process is to publish proposed rules on which to solicit public comment. This document

accomplishes that. Although the proposed rule contains many additions to clarify guidance for cabin management, there are only minor changes which are required of applicants applying for cabin special use permits. The proposed rule, as is the case with existing regulations, requires individuals to apply for nontransferable renewable five year special use permits. However, the proposed rule requires two additional items (date of construction or acquisition of the cabin and the dimension of the cabin and related structures) to be submitted in the application. In addition to the increased application requirements, the proposed rule has additional requirements of permittees such as getting permission from the refuge manager before major modification or rehabilitation is conducted on existing cabins.

The policy of the U.S. Fish and Wildlife Service is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Interested persons may submit written comments, suggestions, or objections regarding the proposal to the regional office at the address provided above. Public hearings to receive comments will be held in Anchorage and Fairbanks, Alaska, and in other Alaska communities as deemed appropriate. Prior local notice will be provided in the affected areas. All relevant comments will be considered prior to issuance of final rules. The Service will then revise the proposed regulations in response to public comments and agency and legislative mandates and publish them as final regulations.

Conformance with Statutory and Regulatory Authorities

The impact of these regulations on subsistence uses has been evaluated as required by section 810 of ANILCA. Subsistence use and access are expected to differ little from existing use. The regulations are consistent with purposes and intent of section 810 and will result in no significant restrictions on subsistence activities.

Properly regulated and managed cabin use is consistent with the purposes for which the various refuges in Alaska were established.

National Environmental Policy Act Compliance

The promulgation of these cabin management regulations would generally maintain the status quo existing under the current rules. Additionally, changes in environmental effects would be negligible. Therefore the implementation of regulations relative to cabin management on National Wildlife Refuges in Alaska is determined to be a categorical exclusion as detailed in the Department of Interior Manual (516 DM 6, Appendix 1). An Environmental Action Memorandum documenting this decision was signed on June 7, 1990.

Paperwork Reduction Act

The information collection requirements contained in this proposed rule (50 CFR 36.33) has been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* The collection of this information will not be required until it has been approved by the Office of Management and Budget.

The public reporting burden for the information collection requirements contained in this proposed rule is estimated to be 1.5 hours per response, including time for reviewing instructions, gathering and maintaining data. Direct comments on the burden estimate or any other aspect of such information collection requirements to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service (MS–224 Arlington Square); Washington, DC 20240; and the Paperwork Reduction Act Project (1018–FWS004), Office of Management and Budget, Washington, DC 20503.

Economic Effects

Executive Order 12291, "Federal Regulation," of February 19, 1981, requires the preparation of regulatory impact analysis for major rules. A major rule is one likely to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or significant adverse effects on the ability of United States-based enterprises to compete with foreign-based enterprises. The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) requires preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which include small businesses, organization or governmental jurisdictions.

This rule is expected to cost the National Wildlife Refuge System less than $10,000 annually for permit processing and is expected to cost the users of refuge resources who need permits less than $6,000 annually. This is based on the time and effort involved in the application process as well as possible telephone or postage charges (estimated at $20 total for individual and $120 for commercial applicants).

The Department of the Interior has determined that this rulemaking is not a "major rule" within the meaning of Executive Order 12291, and certifies that it will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This rulemaking will impose no costs on small entities; the exact number of businesses and the amount of trade that will result from this Federal land-related activity is unknown. The aggregate effect is a positive economic effect on a number of small entities. The number of small entities affected is unknown, but the fact that the positive effects will be seasonal in nature and will, in most cases, merely continue pre-existing uses of public lands indicates that they will not be significant.

These regulations do not meet the threshold criteria of "Federalism Effects" as set forth in Executive Order 12612. Likewise, a "Takings Implication Assessment" reveals that these regulations have no signficant takings implication relating to any property rights as outlined by Executive Order 12630.

William Knauer, Refuges and Wildlife, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska, is the primary author of this proposed rulemaking document.

List of Subjects in 50 CFR Part 36

Alaska, National Wildlife Refuge System, Public land-mineral resources, Public lands-rights-of-way, Recreation, Traffic regulations, Wildlife refuges.

For the reasons set out in the preamble, part 36 of title 50 of the Code of Federal Regulations (CFR) is proposed to be amended as follows:

1. The authority citation for part 36 continues to read as follows:

Authority: 16 U.S.C. 460(k) et seq., 668dd et seq., 742(a) et seq, 3101 et seq., and 44 U.S.C. 3501 et seq.

2. The text in § 36.3 would be removed and reserved as follows:

§ 36.3 Information collection.—[Reserved]

3. Section 36.33 is revised to read as follows:

§ 36.33 Cabins and other structures

(a) As used in this section, the term:

(1) *Administrative cabin* shall mean any cabin only used by refuge or other authorized personnel for the administration of the refuge.

(2) *Cabin* shall mean a small, usually single-story, three or more sided structure that is permanently and completely enclosed with a roof and

walls. The roof and walls are not fabric, cannot be easily disassembled, and are not removed seasonally.

(3) *Existing cabin* shall mean any cabin situated on federal lands before December 2, 1980. A cabin legally situated on lands that subsequently become refuge will also be considered an "existing" cabin providing the applicant meets the appropriate application deadlines.

(4) *Family* shall include spouse (including what is known as a common-law relationship), children by birth or adoption, and other blood relatives within the second degree of kindred.

(5) *Guest* shall mean a person who occasionally visits the permittee in the cabin. This does not include clients.

(6) *Immediate family* shall include the legal spouse and children, either by birth or adoption, of the claimant residing in the cabin or structure.

(7) *New cabin* shall mean any permitted cabin constructed on refuge lands after December 2, 1980. This may also include a cabin whose claimant failed to meet the application deadline for existing cabins but is otherwise a permitted cabin.

(8) *Other related structures* shall mean those structures or devices essential to the activities for which the cabin special use permit is issued. This includes but is not limited to outdoor toilets, food caches, storage sheds, and fish drying racks.

(9) *Public use cabin* shall mean a cabin owned and administered by the Fish and Wildlife Service and available for use by the public.

(10) *Trespass cabin* shall mean any cabin on federal lands after December 2, 1980, without authorization or permit.

(b) All cabins—The regulations in the following section shall apply to all cabins, claimants, occupants, and guests.

(1) A special use permit is required to construct, use and/or occupy a cabin on refuge lands. The permit may also authorize the use of related structures and other necessary appurtenances.

(2) Applications for existing cabins will only be accepted for a period of 90 days following the effective date of these regulations; however, cabins legally located on lands that subsequently become refuge will also be considered "existing" cabins. The owners will have two years following the date the lands become refuge to apply for a permit. Following those dates, all applications for cabins will be for "new" cabins only.

(3) After adequate public notice has been given, unclaimed cabins become the property of the Federal Government. A Government-owned cabin may be used for refuge administration, used for emergency purposes by the public, permitted to another applicant, designated a public use cabin, or destroyed. Disposal of excess cabins and structures will be according to regulations pursuant to title 41, chapter 114 of the Code of Federal Regulations.

(4) Willful noncompliance of the conditions and stipulations of a special use permit shall be considered grounds to invoke the administrative process leading to notice and hearing, and possible revocation of the permit.

(5) No special use permit will be issued for the construction of a cabin for private recreational use or for the private recreational use of an existing cabin.

(6) Guests are allowed to occupy a cabin only during the activity period identified on the special use permit. Guests occupying a cabin during the absence of the permittee shall obtain a letter of authorization from the permittee. The guest must have a copy of the letter in his/her possession. In commercial cabins, the permittee or another person listed on the permit must be present when the cabin is occupied by guests or clients.

(7) A person whose permit application (new or renewal) for a cabin has been denied or whose cabin permit has been revoked by the refuge manager may appeal to the Regional Director as described in 50 CFR subpart F, § 36.41(b).

(c) Existing cabins—In addition to paragraph (b) of this section, the regulations in the following section shall apply to all existing cabins, claimants, occupants, and guests.

(1) Where a valid cabin permit or lease was in effect on December 2, 1980, or at the time the land was subsequently added to the refuge, the refuge manager shall provide for the continuation of the permit or lease under the same conditions. The new permit shall be nontransferable and renewable every five years unless the continuation would directly threaten or significantly impair the purposes for which the refuge was established.

(2) To obtain a special use permit for a cabin that was not under permit or lease before December 2, 1980, or at the time the land was subsequently added to the refuge, a claimant should submit to the refuge manager an application that includes the following:

(i) Reasonable proof of possessory interest or right to occupy the cabin as shown by affidavit, bill of sale, or other document.

(ii) Date of construction or acquisition.

(iii) A sketch or photograph that accurately depicts the cabin and related structures.

(iv) The dimensions of the cabin and related structures.

(v) A U.S. Geological Survey topographic map that shows the geographic location of the cabin and related structures.

(vi) The claimant's agreement to vacate and remove all personal property from the cabin and related structures within one year from receipt of a nonrenewal or revocation notice. The cabin and related structures are the personal property of the claimant and can be removed by him/her upon nonrenewal or revocation.

(vii) The claimant's acknowledgment that he/she has no legal interest in the real property on which the cabin and related structures are located.

(viii) A list of family members residing with the claimant in the cabin being applied for. It need only include those immediate family members who may be eligible to renew a permit for continued use and occupancy upon the original claimant's death. (This is not applicable to cabins used for commercial purposes.)

(3) Applications for permits for existing cabins will only be accepted for a period of 90 days following the effective date of these regulations; however, cabins that were legally located on lands that subsequently become refuge, will also be considered "existing" cabins. The owners will have two years following the date the lands become refuge to apply for a permit. Following those dates, all applications for cabins will be for "new" cabins only, no matter when the cabin was built or first used. If ownership is not established within three years after the land becomes refuge, the cabin may be considered abandoned, and it will become federal property in accordance with federal regulations.

(4) The occupancy of a noncommercial cabin is limited to the permittee and his/her family, bonafide partners, and guests.

(5) Major modification or rehabilitation of an existing cabin must be approved by the refuge manager before construction begins. The modifications will be done by the permittee or designated agent and will remain the property of the permittee. Major additions (e.g., larger than the original cabin) may fall under the ownership provisions for new cabins. Although cabins destroyed by accidents or natural causes may be reconstructed, they must be approved by the refuge manager before construction and must

meet the construction guidelines for new cabins, even though remaining the property of the claimant.

(d) New cabins—In addition to paragraph (b) of this section, the regulations in the following section shall apply to all new cabins, claimants, occupants, and guests.

(1) A nontransferable, five year special use permit shall only be issued upon a determination that the proposed construction, use and maintenance of the cabin is compatible with refuge purposes and that the cabin use is either directly related to refuge administration or is needed for continuation of an ongoing activity or use otherwise allowed within the refuge where the applicant lacks a reasonable off-refuge site. In addition, these activities must have historically been supported by the construction and use of cabins in the geographic area. In general, new cabin permits will be given only to local residents to pursue a legitimate subsistence activity. The activity must be customary and traditional for the applicant and the area, and the need for a cabin must be clearly proven. In determining whether to permit the construction, use, and occupancy of cabins or other structures, the refuge manager shall be guided by factors such as other public uses, public health and safety, environmental and resource protection, research activities, protection of historic or scientific values, subsistence uses, endangered or threatened species conservation and other management considerations necessary to ensure that the activities authorized pursuant to a permit are compatible with the purposes for which the refuge was established.

(2) To obtain a special use permit for a new cabin, an applicant should submit to the refuge manager an application that includes the following:

(i) A sketch that accurately depicts the proposed cabin and related structures.

(ii) The dimensions of the proposed cabin and related structures.

(iii) A U.S. Geological Survey topographic map that shows the geographic location of the proposed cabin and related structures.

(iv) The applicant's agreement to vacate and remove all personal property from the cabin and related structures within one year from receipt of a nonrenewal or revocation notice.

(v) The applicant's acknowledgment that he/she has no legal interest in the cabin and related structures or in the real property on which the cabin and related structures are located.

(vi) A list of family members residing with the applicant in the cabin being applied for. It need only include those immediate family members who may be eligible to renew a permit for continued use and occupancy upon the original claimant's death.

(3) The permitting instrument shall be a nontransferable renewable five year special use permit. It shall be renewed every five years (upon request) until the death of the original claimant's last immediate family member unless the special use permit has been revoked or the cabin has been abandoned.

(4) No new cabins will be constructed in designated wilderness areas unless they are built specifically for the administration of the area, for public safety, or for trapping where trapping has been a customary and traditional use.

(5) New trapping cabins in wilderness will be available for public use to ensure public health and safety.

(6) The occupancy of a noncommercial cabin is limited to the permittee, and his/her family, bonafide partners, and guests.

(e) Commercial cabins—In addition to paragraph (b) of this section, the regulations in the following section shall apply to all commercial cabins, permittees, occupants, and guests.

(1) A special use permit is required for all cabins used for commercial purposes. Refuge managers may also issue special use permits that authorize additional commercial use of an existing cabin used for guiding, etc. The use of a new cabin shall be limited to the type of use specified in the original permit. The refuge manager may permit the use of an existing cabin on non-wilderness refuge lands for the exercise of valid commercial fishing rights. Such a permit may be denied if, after conducting a public hearing in the affected locality, it is found that the use is inconsitent with refuge purposes and is a significant expansion of commercial fishing activities within the unit beyond 1979 levels.

(2) When the commercial fishing or guiding rights associated with a permittee's existing cabin are acquired by a new party, the privilege of using the cabin cannot be sold and the new party does not necessarily qualify for a cabin permit. He/she must apply for a permit and meet the criteria described herein before issuance of a special use permit by the refuge manager. He/she may not occupy the cabin before issuance of a permit.

(3) No new commercial cabins will be permitted in wilderness areas.

(4) Commercial cabins may be occupied only by persons legitimately involved in the commercial enterprise, assistants, employees, their families, guests and clients and only during the time that the authorized activity is occuring. The names of those individuals, excluding guests and clients, will be listed on the permit. The permittee or another individual listed on the permit must be present when the cabin is occupied.

(5) Special use permits for commercial cabin may be renewed annually in conjunction with the special use permit renewal for the commercial activity itself. The cabin permit may be issued for periods of up to five years and is a separate permit from one issued for the commercial activity.

(f) Administrative and government-owned public use cabins—In addition to paragraph (a) of this section, the regulations in the following section applies to all administrative and government-owned cabins.

(1) The refuge manager can designate those cabins not under permit as administrative cabins to be used for official government business. Administrative cabins may be used by the public during life-threatening emergencies. On a case-by-case basis, they may also be designated as public use cabins when not needed for government purposes. In such cases, the refuge manager must inform the public and post dates or seasons when the cabins are available.

(2) The refuge manager may designate government-owned cabins as public use cabins. They are only intended for short-term public recreational use and occupancy. The refuge manager may develop an allocation system for managing public use cabins for short-term recreational use. No existing public use cabins shall be removed or new public use cabins constructed within wilderness areas designated by the Alaska National Interest Lands Conservation Act of 1980 or subsequently designated wilderness areas until the Secretary of the Interior notifies the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources.

Dated: December 31, 1990.

Bruce Blanchard,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 91-9719 Filed 4-24-91; 8:45 am.]

BILLING CODE 4310-55-M

Notices

Federal Register
Vol. 56, No. 80
Thursday, April 25, 1991

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forms Under Review by Office of Management and Budget

April 19, 1991.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer USDA, OIRM, room 404–W, Admin. Bldg., Washington, DC 20250 (202) 447–2118.

Revision

• Agricultural Stabilization and Conservation Service.

7 CFR part 12, 718, and 1404, Report of Acreage, Highly Erodible Land and Wetland Conservation Certification Requirements, and Assignments of Payments.

AD–1026, 1026B, 1068, 1069, 1026A Supplement; ASCS–578 & 492; CCC–21, 36, 37, 251, 252.

On occasion; Annually.

Individuals or households; Farms; Small businesses or organizations; 5,145,538 responses; 2,274,557 hours.

Lavonne Maas (202) 447–8128.

Extension

• Economic Research Service.

Supplemental Qualifications Statement.

Submitted with application for employment.

Individuals or households; 83 responses; 341 hours.

George Tsempales (202) 447–3410.

• National Agricultural Statistics Service.

Aquaculture Surveys.

Monthly; Quarterly; Semi-annually; Annually.

Farms; 6,066 responses; 1,505 hours.

Larry Gambrell (202) 447–7737.

Donald E. Hulcher,

Deputy Departmental Clearance Officer.

[FR Doc. 91–9771 Filed 4–24–91; 8:45 am]

BILLING CODE 3410–01–M

Food and Nutrition Service

Privacy Act; System of Records

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice of new Privacy Act system of records.

SUMMARY: Notice is hereby given that USDA proposes to create a new Privacy Act system of records, USDA/FNS–8, entitled "FNS Studies and Reports, USDA/FNS–8."

The FNS frequently conducts studies in which personal information on FNS program applicants, participants, eligibles and beneficiaries is collected. The information is collected and maintained only as long as necessary to accomplish the objectives of the studies and reports. Contracts with private firms to complete such studies contain requirements that all personal information on individuals must be destroyed when the contract is completed. If FNS conducts studies internally, the personal data is destroyed when it is no longer needed, which is usually at the end of the study.

EFFECTIVE DATE: This proposed notice will be effective, without further notice, June 24, 1991, unless modified by a subsequent notice to incorporate comments received from the public. Comments must be received by the contact person listed below on or before June 10, 1991, to be assured of consideration.

ADDRESSES: Comments should be addressed to: Christy Schmidt, Acting Director, Office of Analysis and Evaluation, room 208, 3101 Park Center Drive, Alexandria, Virginia 22302. Telephone: (703) 756–3017.

FOR FURTHER INFORMATION CONTACT: Joseph M. Scordato, FNS Privacy Act Officer, room 308, 3101 Park Center Drive, Alexandria, Virginia 22302. Telephone: (703) 756–3234.

SUPPLEMENTARY INFORMATION: The Office of Analysis and Evaluation (OAE) conducts research and evaluation projects and studies on the programs administered by the Food and Nutrition Service (FNS) of the Department of Agriculture. These programs include the Food Stamp Program, the Special Supplemental Food Program for Women, Infants and Children (WIC), the National School Lunch Program, the School Breakfast Program, the Commodity Supplemental Food Program, and others. OAE assists the FNS Administrator by providing valid, timely, and unbiased analysis and evaluation information to support Agency decisions regarding policy, legislative, budgetary, regulatory, and program management processes. The office: (1) Assesses the effectiveness and efficiency of FNS ongoing programs; (2) evaluates the effectiveness and efficiency of demonstration and pilot programs; (3) provides leadership and technical assistance throughout FNS in the area of research and program evaluation; (4) develops analyses of completed evaluations to support the Administrator; (5) interprets research findings for use in the policy process; (6) prepares and develops program and cross-program analyses, staff papers, and memoranda to support the Agency in development of policy initiatives; (7) conducts analyses of cost and impact of budgetary and legislative initiatives; (8) supports the Administrator in presentation of policy decisions and/or recommendations before Department level officials, and other Agencies including the Office of Management and Budget and the Congress; (9) conducts and manages program and demonstration research; and (10) reviews legislation, regulations, and reports and identifies and/or helps resolve issues to assure consistency with policy decisions.

To meet its mission of providing valid, timely and unbiased information to support Agency decisions, OAE conducts the research and demonstration activities mentioned earlier on the mandate of the Congress and Federal oversight agencies, and at the direction of the Administrator, FNS. From time to time, to meet these requirements, it is necessary to conduct studies which temporarily gather information on individual participants in the programs to measure impacts, efficiency, and effectiveness of the programs. Due to the time and expense involved, it is burdensome to prepare and publish a specific notice of the information gathered for each study. FNS therefore proposes that a generic system of records be established so that the Agency will have the authority to collect information on individuals for purposes of the study and destroy the identifiable items in the records when they are no longer needed. FNS assumes that the use of the data is temporary. In some cases where the need for data retention on identifiable items is more than two years, a separate notice will be published for that study notifying the public of the proposed exception. Identifiable items, for the purposes of this notice, are defined as items which contain names and other information which specify an individual.

USDA/FNS–8 SYSTEM NAME:

FNS Studies and Reports.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Records of studies conducted internally will be located in the Office of Analysis and Evaluation, room 208, 3101 Park Center Drive, Alexandria, Virginia 22302. Records will be located with the contractor when studies are performed by contract.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system consists of personal information from persons who are eligible for, have participated in, been recipients of, or participated in some capacity in the administration of FNS-sponsored benefit programs.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual records may contain information on program applicants, participants, eligibles and beneficiaries of FNS-sponsored programs, and vital statistics such as birth and death records. This information may include but is not limited to their names, addresses, identifying numbers, and program-specific information such as income, family status, participation in programs sponsored by other agencies, location of birth, birthweight, health status, medical claims, diagnostic codes, and other pertinent information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Federal statutes requiring studies of the food assistance programs: 7 U.S.C. 2011–27; 42 U.S.C. 1751–89; 7 U.S.C. 1431, 1431e, 612c, 612c note.

PURPOSE:

To study and determine the impact, efficiency and/or effectiveness of FNS-sponsored programs and for the purpose of reporting to the Congress, oversight agencies, and/or departmental and FNS officials.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

USDA/FNS–8. The records in this system may be disclosed to private firms that have contracted with FNS to collect, aggregate, analyze, or otherwise refine records for the purpose of research and reporting to Congress and appropriate oversight agencies, and/or departmental and FNS officials.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

File folders, magnetic tapes, and computer disks.

RETRIEVABILITY:

Information is retrieved by coded identification number once analysis files have been successfully constructed and edited. The coded number bears prevents association of data with individual identifiers except by authorized individuals. This is a security measure which allows linkage of individual identifying information with study data through computer media. Paper records containing identifying information and study data are not needed or retained once the information has been entered onto magnetic tapes and/or computer disks.

SAFEGUARDS:

1. *Authorized users:* When designing, developing and/or operating a system of records on individuals, contractors are required to comply with all provisions of the Privacy Act. Contractors are required to maintain and protect the personal data and cannot release or share the data without consulting with FNS. Access to records maintained within FNS is limited to those staff officials responsible for the subject system of records. Otherwise, access is limited to persons authorized and needing to use the records, including project directors, contract officers, programmers, analysts, statisticians, statistical clerks and key punch operators on the staffs of the contractors or in the FNS.

2. *Physical safeguards:* Hard copy records are stored in locked safes, locked files, and locked offices when not in use. Computer terminals used to process identifiable data are located in secured areas and are accessible only to authorized users. Should they be maintained, back-up records which are stored off-site shall be used and stored under the same secure conditions.

3. *Procedural safeguards:* Names and other identifying characteristics from the interim records are not contained on the records encrypted for analysis. Encrypted data are indexed by code numbers. There will be no tables or files which link these code numbers with the original names or identifying attributes. Only those staff with a need to link identifiable information will be given the appropriate identifiers and access procedures.The FNS project officers and contract officers oversee compliance with these requirements. When appropriate, the FNS will review the site facilities to ensure that records have been maintained in accordance with the terms of this notice.

RETENTION AND DISPOSAL:

Names and other identifying information are maintained in the file until conclusion of the file matching process. The portion of records which contain identifiable items will be maintained until they are no longer needed but not more than two years. The identifiable items portion of the records will then be destroyed. Aggregate data in analysis files may be kept in perpetuity according to the needs of the Department for longitudinal comparisons.

SYSTEM MANAGER AND ADDRESS:

Director, Office of Analysis and Evaluation, Food and Nutrition Service, United States Department of Agriculture, room 208, 3101 Park Center Drive, Alexandria, Virginia 22302. Telephone: (703) 756–3017.

NOTIFICATION PROCEDURE:

To determine if a record containing an identifiable item exists, write to the System Manager, giving your full name and address.

RECORD ACCESS PROCEDURES:

An individual may obtain information about gaining access to a record containing an identifiable item in the

system which pertains to him or her by submitting a written request to the System Manager. The envelope and the letter should be marked, "Privacy Act Request." An individual may be required to reference the record by furnishing name, address, Social Security Number, and/or other identifiers needed by FNS and administering agencies to discern the record.

CONTESTING RECORD CATEGORIES:

Individuals desiring to contest or amend information maintained in the system should direct their request to the System Manager, the reasons for contesting it, and the proposed amendment to the information with supporting information to show how the record is inaccurate, incomplete, untimely, or irrelevant.

RECORD SOURCE CATEGORIES:

Information in this system will come from program application and participation records of applicants, eligibles, participants and beneficiaries of FNS programs, such as the Food Stamp Program, the Special Supplemental Food Program for Women, Infants and Children (WIC), the National School Lunch Program, the School Breakfast Program, the Commodity Supplemental Food Program, and others. Records are created based on information gathered from individuals themselves and from State and local agencies which administer the programs.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

Dated: April 19, 1991.

Edward Madigan,

Secretary.

[FR Doc. 91-9786 Filed 4-24-91; 8:45 am]

BILLING CODE 3410-30-M

Forest Service

Alaska Region; Legal Notice of Appealable Decisions

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: Deciding Officers in the Alaska Region will publish Notice of Decisions subject to administrative appeal under 36 CFR part 217 in the legal notice section of the newspapers listed in the Supplementary Information section of this notice. As provided in 36 CFR 217.5, such notice shall constitute legal evidence that the agency has given timely and constructive Notice of Decisions that are subject to administrative appeal. Newspaper publication of Notices of Decisions is in addition to direct notice to those who have requested notice in writing and to those known to be interested in or affected by a specific decision.

DATES: Use of these newspapers for purposes of publishing legal Notice of Decision subject to appeal under 36 CFR 217 shall begin May 1, 1991.

FOR FURTHER INFORMATION CONTACT: Thomas J. Sheehy, Regional Appeals Coordinator, Alaska Region, USDA, Forest Service, PP&B, P.O. Box 21628, Juneau, Alaska 99802, telephone 907-586-8887.

SUPPLEMENTARY INFORMATION: Deciding Officers in the Alaska Region, except for the Chugach National Forest, will give legal Notice of Decisions subject to Appeal under 36 CFR part 217 as set forth in the **Federal Register**, vol. 55, No. 212, pages 46091 to 46092, November 1, 1990.

Pursuant to 36 CFR 217.5, the Chugach National Forest is changing the primary newspaper for publication of legal Notice of Decisions from the Anchorage Times to the Anchorage Daily News, which is published daily in Anchorage, Alaska. Supplemental newspaper sources for the Chugach National Forest will remain as stated in the **Federal Register**, vol. 55, No. 212, pages 46091 to 46092, November 1, 1990.

Dated: April 15, 1991.

Robert W. Williams,

Deputy Regional Forester.

[FR Doc. 91-9724 Filed 4-24-91; 8:45 am]

BILLING CODE 3410-11-M

Blanchett Park Dam and Reservior Proposal, Ashley National Forest, Uintah County, UT

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The UWCD (Uintah Water Conservancy District) has submitted a special use application for construction of a dam and reservoir at Blanchett Park on the Vernal ranger District of the Ashley National Forest. Forest Supervisor, Duane G. Tucker, has determined this proposal will be a major federal action which may affect the quality of the human environment, requiring the preparation of an EIS (Environmental Impact Statement).

DATES: To be most useful for early identification of issues, comments concerning the scope of the analysis should be received in writing by June 20, 1991.

ADDRESSES: Written comments and questions should be sent to: Mary A. Wagner, District Ranger, Vernal Ranger District, Ashley National Forest, 353 N. Vernal Avenue, Vernal, Utah 84078.

FOR FURTHER INFORMATION CONTACT: Specific questions about the proposed project and analysis should be directed to Nancy Ross, ID Team Leader, Vernal Ranger District, 353 N. Vernal Ave., Vernal, Utah (801) 789-1181.

SUPPLEMENTARY INFORMATION: Blanchett Park, a high elevation meadow, is located approximately 25 air-miles northwest of Vernal in the northwest corner of Uintah County, Utah. The meadow's elevation is about 10,000 feet in the headwaters of Dry Fork Creek. The proposed dam would store approximately 3560 acre-feet of water. The objectives of this storage are for irrigation and municipal water, and to provide flood control along Ashley and Dry Fork Creeks.

Forest Service management objectives for this proposal are to be responsive to a special use application. The decision will be whether to approve or deny this application. Alternative reservoir locations were investigated by the UWCD prior to submitting this application, therefore, these type of alternatives will not be explored in the EIS. A range of alternatives, including the No Action alternative, will be developed around issues, opportunities and mitigation measures.

Preliminary issues identified through internal scoping include: recreation, visual quality, fisheries, wildlife, proposed site is within inventoried roadless area, hydrology, domestic grazing, soils, geology, socio-economics, timber, and the possibility of jurisdictional wetlands. A permit issued by the Department of Army Corps of Engineers under Section 404 of the Clean Water Act will be required if it is determined that jurisdictional wetlands do exist within the project area.

Public participation is especially important at several points during the analysis, particularly during initial scoping and review of the draft EIS. Individuals, organizations, federal, state, and local agencies who are interested in or affected by the decision are invited to participate in the scoping process. This information will be used in preparation of the draft EIS.

Formal scoping begins upon publication of this notice and will include newspaper articles, mailing of information to known interested parties, and two public meetings. The meetings will be held May 29th & 30th in Vernal and Salt Lake City respectively at 7 p.m.

The Vernal meeting will be in the Vernal Middle School auditorium, 721 West 100 South; and the Salt Lake City Meeting will be in the Department of Natural Resources auditorium. 1636 West North Temple.

The second major opportunity for public input is the draft EIS. The draft EIS is expected to be filed with the EPA (Environmental Protection Agency) and to be available for public review in April of 1992. At that time the EPA will publish a notice of availablity of the draft EIS in the **Federal Register.** The comment period on the draft EIS will be 45 days from the date the EPA's notice of availability appears in the **Federal Register.** It is very important that those interested in this proposed action participate at that time. To be the most helpful, comments on the draft EIS should be as specific as possible and may address the adequacy of the statement or the merits of the alternatives discussed (Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points).

The Forest Service believes it is important to give reviewers notice at this early stage of several federal court decisions related to public participation in the environmental review process. First, reviewers of draft environmnental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 533 (1978). Second, environmental objections that could have been raised at the draft stage may be waived if not raised until after completion of the final environmental impact statement. City of Angoon v. Hodel, (9th Circuit, 1986) and Wisconsin Heritages, Inc. v. Harris 490 F. Supp. 1334, 1338 (E.D. Wis, 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

After the comment period ends on the draft EIS, the comments will be analyzed and considered by the Forest Service in preparing the final EIS. The final EIS is scheduled to be completed in June, 1992. Duane G. Tucker, Forest Supervisor, Ashley National Forest is the responsible official for this EIS and the Record of Decision.

Dated: April 16, 1991.

Donald Marchant,

Acting Forest Supervisor.

[FR Doc. 91-9769 Filed 4-24-91; 8:45 am]

BILLING CODE 3410-11-M

Checkerboard Land Exchange; Kootenai National Forest, Lincoln, Flathead and Sanders Counties, MT

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare environmental impact statement.

SUMMARY: The Department of Agriculture, Forest Service (FS), Kootenai National Forest (KNF), with assistance from Plum Creek Timber Company, Limited Partnership, (PCTC), will prepare an environmental impact statement (EIS) for a proposal to exchange National Forest land for PCTC land. The project area is located approximately mid-way between Libby and Kalispell, Montana. The Statement of Intent to exchange tracts of land was signed on April 27, 1988. This exchange is proposed pursuant to the General Exchange Act of March 20, 1922, as amended, the Federal Land Policy Management Act of October 21, 1976, and the act of January 30, 1929.

DATES: Comments concerning the scope of the analysis must be received in writing by June 17, 1991, so they may be considered in the Draft Environmental Impact Statement.

ADDRESSES: Send written comments concerning the analysis to Robert L. Schrenk, Forest Supervisor, Kootenai National Forest, Supervisor's Office, 506 U.S. Hwy. 2 West, Libby, Montana 59923.

FOR FURTHER INFORMATION CONTACT: Ted Andersen, Project Coordinator, kKootenai National Forest, Supervisor's Office, telephone (406) 293-6211.

SUPPLEMENTARY INFORMATION: Plum Creek Timber Company, Limited Partnership, owns approximately forty-seven sections of land, each containing approximately 640 acres, within the Silver Butte, East Fisher, West Fisher and Vermilion drainages. These sections alternate with National Forest sections, and together they comprise what is referred to as the "Checkerboard" area on the KNF and Lolo National Forest. The majority of the area is unroaded, and is characterized by a variety of topographic land types from steep, rugged slopes to lush riparian creek and river bottoms. Some of the area that burned in the early part of the century is covered by dense, lodgepole pine stands, while the unburned areas support virgin stands of cedar, white pine, western larch and Douglas fir.

Most of the National Forest (NF) land in the Checkerboard area was designated for timber management in December, 1979, upon completion of Unit Plans. The intermingled ownership pattern influenced the timber management designation of NF lands. In the late 1970's and early 1980's, the Forest Service and Burlington Northern, predecessor of PCTC, agreed to cooperatively construct logging roads into much of the Checkerboard area, to facilitate mutual timber management goals.

After this first planning effort (Unit Planning), KNF prepared the Forest Land and Resource Management Plan (Forest Plan) as required by the National Forest Management Act (NFMA, 1976). Through development of a Draft and Final Environmental Impact Statement for the Forest Plan and informal consultation with the US Fish and Wildlife Service, KNF proposed roadless management allocations for much of the NF land in the Checkerboard area. This was a significant change from the Unit Plan designation but was more in line with the grizzly bear recovery program, a Forest Plan goal (Forest Plan; Pg. II-1, item 5).

The roadless designation also provided for old growth timber retention opportunities, a Forest Plan goal (Forest Plan; Pg. II-1, item 7).

In order to insure the roadless management direction, KNF proposed the intermingled private land be added to the land acquisition plan (Forest Plan; Appendix 9). Thus, the preferred alternative of the EIS recommended that a large portion of the checkerboard area be managed as roadless to facilitate grizzly Bear recovery, and provide for old growth retention, which are Forest Plan goals. The US Fish and Wildlife Service stated the preferred alternative would not likely jeopardize the continued existence of Grizzly bear on the KNF.

In September, 1987, the Regional Forester signed the Record of Decision for the KNF Forest Plan. The selected alternative (Kootenai Forest Plan) provides for roadless management in most of the Checkerboard area with direction to consider acquisition of the intermingled private lands. (Forest Plan; Pg. II-2, Item 15, and Pg. II-9, second to last paragraph).

The "original" Statement of Intent to exchange lands as recommended in the approved Forest Plan was signed by KNF and PCTC on April 27, 1988. This agreement included 16,870 acres of

PCTC land, or approximately one-half of their ownership within the Checkerboard area, and 21,855 acres of KNF land located within five geographic areas of the KNF. The proposal was advertised in local newspapers, including the Daily Inter Lake, located in Kalispell, Montana. Based on comments received, the following preliminary public concerns were identified:

What affect will this land exchange have on the timber base of the KNF?

How will old growth timber be affected?

How will fish and wildlife be affected?

How will threatened and endangered species be affected?

Will water quality be affected?

How will Federal ownership of wetlands and flood plains be affected?

How will traditional recreational uses of Federal and Nonfederal lands be affected?

What affect will this land exchange have on public road and trail access?

Will wilderness values and/or existing roadless areas be affected?

How will receipts to counties be affected?

Based on these preliminary public concerns, KNF and PCTC began negotiations to identify a specific exchange proposal. All lands were prioritized by both parties as to desirability for inclusion in the exchange. A preliminary appraisal was completed to identify a proposal which would have the land values on the Federal tracts approximately equal to the land values on the Nonfederal tracts. The result of successful negotiations along with the awareness of the preliminary public concern is a proposal identifying the following tracts:

Federal Land

Property that the Forest Service will consider exchanging:

Location	Acres	Total
Richards Mountain; T. 30 N., R. 28 W., P.M.M., Lincoln County:		
Sec. 32; Lot 1	34.79	
Lot 2	35.20	
Lot 3	35.62	
Lot 4	36.20	
Lot N½, S½, N½	480.00	
		621.81
Richards Mountain; T. 29 N., R. 28 W., P.M.M., Lincoln County:		
Sec. 4; Lot 1	39.15	
Lot 2	39.05	
Lot 3	38.95	
Lot 4	38.85	
Lot S½, N½, S½	480.00	
		636.00
Fisher Mountain; T. 29 N., R. 29 W., P.M.M., Lincoln County:		
Sec. 32; SW¼NE¼, NW¼NW¼, S½NW¼, SW¼, N½SE¼, SW¼SE¼		440.00
Fisher Mountain; T. 28 N., R. 29 W., P.M.M., Lincoln County:		
Sec. 3; Lot 3	33.43	
NW¼SW¼, S½SW¼	120.00	
Sec. 4; Lot 1	33.62	
		153.43
Lot 2	33.86	
Lot 3	34.10	
Lot 4	34.34	
S½N½, S½	480.00	
		615.92
Sec. 8; All		640.00
Sec. 9; All		640.00
Sec. 10; S½N½, S½		480.00
Sec. 15; NW¼ NE¼SW¼		200.00
Snell Mountain; T. 28 N., R. 28 W., P.M.M., Lincoln County:		
Sec. 20; All		640.00
Sec. 28; All		640.00
Sec. 30; Lot 1	33.85	
Lot 2	33.74	
Lot 3	33.64	
Lot 4	33.53	
E½, E½ W½	480.00	
		614.76
Sec. 21; E½		320.00
Sec. 32; S½		320.00
Meadow Peak; T. 28 N., R. 27 W., P.M.M., Flathead County:		
Sec. 34; S½N½, S½		480.00
Snell Mountain; T. 27 N., R. 28 W., P.M.M., Lincoln County:		
Sec. 4; Lot 1	25.88	
Lot 2	25.99	
Lot 3	26.11	
Lot 4	26.22	
Lot 5	40.00	
Lot 6	40.00	
Lot 7	40.00	
Lot 8	40.00	
Lot 9	40.00	
Lot 10	40.00	
Lot 11	40.00	
Lot 12	40.00	
Lot 13	40.00	
Lot 14	40.00	
Lot 15	40.00	
Lot 16	40.00	
S½	320.00	
		904.20
Sec. 5; Lot 1	26.34	
Lot 2	26.44	
Lot 3	26.56	
Lot 4	26.66	
Lot 5	40.00	
Lot 6	40.00	
Lot 7	40.00	
Lot 8	40.00	
Lot 9	40.00	
Lot 10	40.00	
Lot 11	40.00	
Lot 12	40.00	
Lot 13	40.00	
Lot 14	40.00	
Lot 15	40.00	
Lot 16	40.00	
		586.00
Meadow Peak; T. 27 N., R. 27 W., P.M.M., Lincoln County:		
Sec. 4; All		640.00
Sec. 24; All		640.00
Meadow Peak; T. 27 N., R. 26 W., P.M.M., Flathead County:		
Sec. 32; All		637.20
Sec. 34; All		640.00
Sec. 6; Lot 1	22.64	
Lot 2	22.91	
Lot 3	23.19	
Lot 4	16.41	
Lot 5	28.11	
Lot 6	40.00	
Lot 7	40.00	
Lot 8	40.00	
Lot 9	40.00	
		273.26
Sec. 28; N½, W½SW¼, S½SE¼		400.00
Sec. 30; Lot 1	33.77	
NE¼, E½NW¼, NE¼SE¼	280.00	
		313.77
South McGregor; T. 26 N., R. 26 W., P.M.M., Flathead County:		
Sec. 10; All		640.00
Sec. 14: All Kootenai National Forest		621.00
Lolo National Forest	19.00	
		640.00
Sec. 16; All		640.00
Sec. 22; All: Kootenai National Forest	512.00	
Lolo National Forest	128.00	
		640.00
Sec. 12; S½N½, S½		480.00
Sec. 15; SE¼SE¼		40.00
South McGregor; T. 26 N., R. 25 W., P.M.M., Flathead County:		
Sec. 8; Lot 1	24.52	
Lot 2	36.01	
SW¼SE¼, SW¼, NW¼NW¼, S½NW¼, SW¼NE¼	360.00	
		420.53

These are Public Domain lands reserved by Presidential Proclamation dated March 2, 1907, containing 15,976.88 acres more or less.

Nonfederal Land

Property that Plum Creek Timber Company, Inc., will consider exchanging:

Location	Acres	Total
Barren Peak: T. 25 N., R. 30 W., P.M.M., Lincoln County:		
Sec. 1; Lot 1	42.20	
Lot 2	42.07	
Lot 3	41.95	
Lot 4	41.82	
S½N½	160.00	
S½	320.00	
		648.04
Barren Peak: T. 26 N., R. 30 W., P.M.M., Lincoln County:		
Sec. 5; Lot 1	34.09	
Lot 2	1.90	
NW¼	160.00	
NE¼SW¼	40.00	
SW¼NE¼	40.00	
NE¼SE¼	40.00	
		315.99
Sec. 13; All		640.00
Sec. 23; All		640.00
Sec. 25; All		640.00
Sec. 27; All		640.00

Location	Acres	Total
Sec. 35; Lot 1	40.00	
Lot 2	40.00	
Lot 3	40.00	
Lot 4	40.00	
Lot 5	40.00	
Lot 6	40.00	
Lot 7	40.00	
Lot 8	40.00	
Lot 9	40.00	
Lot 10	40.00	
Lot 11	40.00	
Lot 12	40.00	
Lot 13	26.03	
Lot 14	26.18	
Lot 15	26.32	
Lot 16	26.47	
N½	320.00	
		905.00
Jumbo Peak; T. 25 N., R. 29 W., P.M.M., Lincoln County:		
Sec. 3; SW¼NE¼	40.00	
S½NW¼	80.00	
S½	320.00	
		440.00
Sec. 11; S½	320.00	
NW¼	160.00	
W½NE¼	80.00	
		560.00
Sec. 5; All		649.27
Sec. 7; E½		320.00
Sec. 9; All		640.00
Jumbo Peak; T. 26 N., R. 29 W., P.M.M., Lincoln County:		
Sec. 29; All		640.00
Sec. 31; Lot 1	31.52	
Lot 2	31.60	
Lot 3	31.68	
Lot 4	31.76	
E½W½	160.00	
E½	320.00	
		606.56
Blacktail Peak; T. 25 N., R. 29 W., P.M.M., Lincoln County:		
Sec. 15; Portion in Lincoln County		536.00
Sec. 17; All		640.00
Sec. 19; Portion of E½ in Lincoln County		240.00
Sec. 21; Portion in Lincoln County		87.00
Sec. 23; Portion in Lincoln County		313.00
Sec. 31; E½		320.00
Blacktail Peak; T. 25 N., R. 29 W., P.M.M., Sanders County:		
Sec. 15; Portion in Sanders County		104.00
Sec. 19; Portion of E½ in Sanders County		80.00
Sec. 21; All		553.00
Sec. 23; Portion in Sanders County		327.00
Sec. 27; All		640.00
Sec. 29; All		640.00
Sec. 33; All		640.00
Sec. 35; All		640.00

These are grant lands under the Northern Pacific Railroad Grant of (7/2/1864) containing 14,044.86 acres, more or less.

A range of alternatives will be considered, including a no action alternative and the proposal which was just identified. Based on the issues identified through scoping, all action alternatives will vary in the number of acres to be exchanged, the location of the acres to be exchanged, and the kind of mitigation measures. Issues will drive the formulation of feasible alternatives. Each alternative will have specific management objectives which are responsive to implementing the Kootenai Forest Plan and which address the issues.

The Kootenai National Forest is seeking information, comments, and assistance from other agencies, organizations or individuals who may be interested in or affected by the proposed exchange. Input on the proposed action, as identified by the legal descriptions listed in this notice, will be accepted until June 10, 1991. Alternatives to the proposed action will be developed from this information and included in a draft environmental impact statement, which is anticipated to be published in February 1992.

The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register.** The comments received during the 45-day comment period will be analyzed, and alternatives to the proposed action will be formulated. The analysis process will ultimately lead to one of the following possible decisions: (1) no action (do not make the exchange in the foreseeable future), (2) implement the exchange as proposed, (3) implement one of the alternatives to the proposed action, or (4) implement one of the alternatives with mitigation measures.

The final environmental impact statement is expected to be available in 1992.

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. (Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.)

Dated: April 19, 1991.

Robert L. Schrenk,

Forest Supervisor, Kootenai National Forest.

[FR Doc. 91-9764 Filed 4-24-91; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF COMMERCE

Agency Information Collection Under Review by the Office of Management and Budget

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Minority Business Development Agency.

Title: Applications for funding to operate technical assistance projects.

Form number: SF-424. OMB Number is 0640-0006.

Type of request: Revision.

Burden: 550 respondents with a total of 44,000 reporting hours. Average hours per response is 80 hours.

Needs and uses: The Applications are used to determine the awarding of approximately 110 grants or cooperative agreements each year under two separate programs. These programs are the Minority Business Development Centers (MBDC) and the American Indian Program (AIP).

Affected public: State and local governments, individuals, businesses and non-profit institutions.

Frequency: Annually.

Respondent's obligation: Required to obtain a benefit.

OMB desk officer: Gary Waxman, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377–3271, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Gary Waxman, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: April 22, 1991.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 91–9804 Filed 4–24–91; 8:45 am]

BILLING CODE 3510-CW-M

International Trade Administration

[A–580–605]

Color Picture Tubes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: On February 11, 1991, the Department of Commerce ("the Department") published the preliminary results of its administrative review of the antidumping duty order on color picture tubes ("CPTs") from the Republic of Korea ("Korea") (56 FR 5385). This review covers two manufacturers/exporters of CPTs to the United States for the period January 1, 1989, through December 31, 1989. The review indicates the existence of a *de minimis* dumping margin for Samsung Electron Devices Co., Ltd. ("SED"). We will continue to assign the all-other rate of 1.91 percent from the less than fair value investigation to Goldstar Co., Ltd. ("Goldstar"), because neither Goldstar, nor any of its subsidiaries or affiliates, made any sales or shipments of CPTs from Korea to the United States during the review period.

EFFECTIVE DATE: April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Julie Anne Osgood or Carole A. Showers, Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC, 20230; telephone (202) 377–0167 or 377–3217, respectively.

SUPPLEMENTARY INFORMATION:

Case History

On January 7, 1988, the Department published in the **Federal Register** (53 FR 431) the antidumping duty order on CPTs from Korea. On February 1, 1991, the Department published in the **Federal Register** (56 FR 5385) the preliminary results of this administrative review. We gave interested parties an opportunity to comment on the preliminary results. On February 25, 1991, counsel for SED requested an extension of one week to submit its case briefs on SED's behalf. The Department granted an extension to submit case briefs to both respondent's and petitioners' counsel. The case briefs were filed March 8, 1991. The rebuttal briefs were filed March 15, 1991. No hearing was requested.

The Department has now completed this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of Review

The products covered by this review are CPTs. Prior to the review period, CPTs were classifiable under items 687.3512, 687.3513, 687.3514, 687.3516, 687.3518, and 687.3520 of the Tariff Schedules of the United States Annotated ("TSUSA"). The merchandise is currently classifiable under items 8540.11.00.10, 8540.11.00.20, 8540.11.00.30, 8540.11.00.40, 8540.11.00.50, 8540.11.00.60, and 8540.11.00.80 of the Harmonized Tariff Schedule ("HTS"). The TSUSA and HTS item numbers are provided for convenience and customs purposes. The written description remains dispositive.

CPTs are defined as cathode ray tubes suitable for use in the manufacture of color television receivers or other color entertainment display devices intended for television viewing.

CPTs imported as part of color television receiver kits or as part of incomplete television receiver assemblies that are subsequently assembled into a completed color television ("CTV") by a related party are included within the scope of the antidumping duty order on complete and incomplete color television receivers from Korea ("CTV order") (49 FR 18336, April 30, 1984). Therefore, these CPTs are not included within the scope of this review.

Further, we have determined that all CPTs, which are not covered by the CTV order, are covered by this review unless both of the following criteria are met: (1) The CPT is "physically integrated" with other television receiver components in such a manner as to constitute one inseparable amalgam; and, (2) the CPT does not constitute a significant portion of the cost or value of the item being imported.

United States Price

We based United States price on purchase price for all of SED's sales, in accordance with section 772(b) of the Act, because these sales were made directly to unrelated parties prior to the date of importation into the United States.

We calculated purchase price based on packed, f.o.b. plant prices. We made deductions, where appropriate, for customs clearance fees in accordance with section 772(d)(2) of the Act. We added duty drawback in accordance with section 772(d)(1)(B) of the Act.

Foreign Market Value

In order to determine whether there were sufficient sales of the merchandise in the home market to serve as the basis for calculating foreign market value ("FMV"), we have established separate categories of such or similar merchandise based on the screen size of the CPT models sold in the United States. We considered any CPT sold in the home market that was within two inches in screen size of the CPT sold in the United States to constitute a separate product category of such or similar merchandise.

We then compared the volume of home market sales within each such or similar category to total export sales of that merchandise excluding sales to the United States ("third country sales") in accordance with section 773(a)(1) of the Act. We determined that, for each such or similar category, there were insufficient home market sales to unrelated customers to form an adequate basis for comparison to the CPTs imported into the United States.

Consequently, for each such or similar category, we selected the third country with the largest volume of sales of identical merchandise to serve as a basis for comparison. Therefore, we based FMV of 10-inch, 14-inch, 20-inch, and 21-inch CPTs on sales to Taiwan, Malaysia, Mexico, and Argentina, respectively.

Further, we based FMV for each such or similar category on packed f.o.b., c.&f., and c.i.f. prices to unrelated purchasers. We made deductions, where appropriate, for customs clearance fees, wharfage, foreign inland freight, ocean freight, and marine insurance. We deducted third country packing costs and added U.S. packing costs, in accordance with section 773(a)(1)(B) of the Act. We also added duty drawback.

We made adjustments for differences in circumstances of sales, where

appropriate, for bank handling charges, royalties, and warranties in accordance with § 353.56(a)(2) of the Department's regulations.

We revised the reported wharfage charges, based on information provided in the response, to reflect the maximum discount received on a model-specific basis. We recalculated royalties to reflect sale-specific expenses rather than a weighted-average expense. In addition, we have recalculated warranty expenses to include variable warranty expenses only.

We have not allowed an adjustment for commissions paid by SED to its related agent on third country sales. The Department accepts commissions paid to related parties only when it has determined that these commissions are directly related to specific sales under review and represent an arms-length transaction. We agree that SED has demonstrated that the commissions it paid to its related agent were directly related to the sales under review. However, the Department does not consider the contractual agreements provided by SED between its related agent and unrelated parties on merchandise completely unrelated to the product under review sufficient documentation to illustrate that it paid commissions to its related party at arms-length. Therefore, we are denying this adjustment.

Interested Party Comments

Petitioners' and respondent's comments are discussed below.

Comment 1

Petitioners argue that the Department should use home market sales rather than third country sales as the basis for calculating FMV because the aggregate volume of sales in the home market is adequate and more comparable to the volume of sales to the United States. Petitioners assert that the Department's regulations pertaining to the viability test should not be applied mechanically in a situation that does not warrant the use of third country sales as a basis for FMV.

SED argues that the relative comparability of the U.S. and home markets was not the test for adequacy set forth in either the statute or regulations. SED asserts that the relative sizes of the home market and third country markets define the adequacy of the home market. Furthermore, SED argues that, with regard to the Department's application of the viability test, the only cases in which the Department has deviated from the five percent rule are those in which home markets which literally met the viability test were nevertheless disregarded in favor of larger and more comparable third country markets.

DOC Position

To determine the appropriate market for use as a reference in calculating FMV, the Department compares the volume of home market sales for each such or similar category to the volume of third country sales. Pursuant to § 353.48 of the Department's regulations, we normally determine the home market to be viable if the home market sales volume is equal to or greater than five percent of the volume of sales to third countries. On this basis, the Department determined that SED did not have sufficient sales to form an adequate basis for comparison. Accordingly, for each such or similar category, the Department established FMV on the basis of sales to third country markets. For further discussion, see "Foreign Market Value" section of this notice.

We have also evaluated petitioners' comment as to the mechanical application of the Department's viability test and we do not consider the circumstances of this review so unusual as to require the Department to deviate from its normal comparison market selection practice.

Comment 2

Petitioners maintain that it would be inappropriate to use third country sales rather than home market sales as the basis for FMV where there is evidence of price discrimination in third countries. In support of its argument, petitioners reference Paint Filters and Strainers from Brazil, 55 FR 19181 (May 21, 1987) (Paint Filters).

SED maintains that petitioners' reference to the Department's negative final determination in Paint Filters is inapposite. SED notes that, in Paint Filters, the Department refused to disregard a viable third country in favor of constructed value where there was no viable home market and third country prices were not below the cost of production. SED states that while the Department's determination in that case indicated that "there was no price discrimination between the third country and the United States," this is not the argument which petitioners are requesting the Department to address in this review. SED observes that the existence of price discrimination between the third country market and the United States is precisely the issue in determining whether dumping has occurred in the United States.

DOC Position

In accordance with our regulations and past practice, the Department has determined that sales to third country markets provide the appropriate basis for establishing FMV. See, "Foreign Market Value" section of this notice. Neither our regulations nor our administrative practice provide justification for disregarding third country sales on the basis of alleged "price discrimination" between the home and third country markets.

Furthermore, we agree with respondent that petitioners' reference to Paint Filters is misplaced. In that case, the Department cited the lack of price discrimination between the third country markets and the United States as one of several factors justifying the choice of third country sales over constructed value when the home market was not viable. Thus, "price discrimination" between the home and third country markets was not an issue in that investigation, and is irrelevant in any event.

Comment 3

Petitioners argue that respondent is engaging in price discrimination in third countries because a significant volume of third country sales are made below the cost of production.

SED maintains that an allegation of home market or third country sales made below the cost of production must be submitted no later than 120 days after publication of the notice of initiation of an administrative review. Accordingly, petitioners should have filed an allegation of sales made below the cost of production by June 28, 1990. Therefore, SED argues that petitioners' allegation, originally made on October 23, 1990, and again in its case brief, should be rejected as untimely.

DOC Position

We agree with respondent. Pursuant to § 353.31(c) of the Department's regulations, petitioners' allegation of third country sales made below the cost of production is untimely. Accordingly, the Department did not consider whether third country sales were made below the cost of production for purposes of the final results of this review.

Comment 4

Petitioners argue that sales to third countries should not be used as the basis for FMV because the volume of sales to third countries is not comparable to the volume of sales to the United States. In addition, petitioners argue that if the Department uses sales

to Hong Kong for purposes of the final determination, then, at a minimum, an adjustment should be made for the differences in quantities sold.

SED asserts that petitioners' argument against using third country prices as a basis for calculating FMV because of differences in quantities sold applies only to comparisons after the appropriate basis for FMV has been determined.

DOC Position

When the Department establishes which market to use as the basis for FMV, it is concerned with the "adequacy" of the volume of sales between markets, not the "comparability" of the volume of those sales, i.e., whether sales are made in the same magnitude between markets. See, "Foreign Market Value" section of this notice. In response to petitioners' second argument, because the Department did not use sales to Hong Kong for purposes of calculating FMV this issue is no longer relevant.

Comment 5

Petitioners argue that sales to third countries should not be used as the basis for calculating FMV because sales to third countries were not made at the same level of trade as U.S. sales. Further, petitioners maintain that because sales to the United States were sample sales to be used for testing purposes and sales to third countries were for the most part made to television manufacturers apparently for use in assembly into television receivers, then at a minimum if the Department uses third country sales, an adjustment should be made to account for this difference.

SED maintains that an adjustment for differences in level of trade is applied after the appropriate basis for foreign market value has been determined.

DOC Position

While comparability in level of trade is a factor the Department may consider in selecting among third country markets to be used as the basis for FMV, it is not a requirement to determine the use of either home market or third country sales. In response to petitioners' second argument, while the Department would consider making an adjustment to FMV to account for differences in levels of trade, petitioners have not provided any information demonstrating how these differences affect price comparability. Accordingly, no adjustment has been made.

Comment 6

Petitioners assert that SED has not properly established its entitlement to the duty drawback claimed. Petitioners claim that SED has not submitted any proof that it paid import duties to the Korean government or that it reimbursed its suppliers for import duties. Accordingly, petitioners state that SED should be denied its claim to a duty drawback adjustment.

SED argues that it is not required to submit proof of the type which petitioners seek to require. SED maintains that under Korean law, customs authorities pay drawback only for those duties which SED can prove it paid, either by presenting its own import documents or by presenting its suppliers' import certificates. SED argues that it can never receive more in drawback that it or others actually paid in duties.

DOC Position

We agree with respondent. In the Final Determination of Sales at Less than Fair Value: Color Picture Tubes from Korea, 52 FR 44186 (November 18, 1987) (Comment 5), the Department verified that SED received duty drawback only in the amount of duties actually paid. For this review period, the Department did not conduct a verification. However, petitioners have not provided any information that leads us to question the integrity and legitimacy of the Korean duty drawback system that we verified during the less than fair value investigation. Furthermore, petitioners have not provided any information that would cause us to question the reasonableness of the duty drawback data SED submitted for this review. Therefore, we made the appropriate adjustment for SED's duty drawback claim.

Comment 7

Petitioners contend that SED has failed to establish that there is a direct correlation between the amount of duty drawback received during the review period and the import duties paid on the CPTs subject to the review.

SED argues that in order to qualify for the adjustment, it must only establish that import duties have actually been paid and rebated, and that there is "a sufficient link" between the import duties paid and the duty drawback received.

DOC Position

We agree that SED has sufficiently demonstrated that it is entitled to this adjustment. See, DOC Position to Comment 6 (above) and Polyethelene Terephthalate Film, Sheet and Strip from the Republic of Korea, 55 FR xx (Final Determination dated April 15, 1991) (Comment 1).

Comment 8

Petitioners argue that SED's duty drawback claim is based on more than import duties and taxes. Petitioners contend that to the extent that SED's duty drawback claim includes taxes, the Department should not have added these taxes automatically to U.S. price as import duties refunded because the taxes are simply not import duties.

SED asserts that the only tax for which it received a refund is the "defense tax." SED argues that the defense tax is not a separate tax on the product, but rather it is a surcharge paid on other taxes.

DOC Position

We agree with respondent. In Color Television Receivers from Korea: Final Results of Antidumping Duty Administrative Review, 53 FR 24975 (July 1, 1988) (Comment 28), the Department determined that the duties and defense taxes included in the duty drawback were rebated on merchandise exported to the United States. We stated that regardless of its name, a tax imposed upon importation and rebated upon exportation, in a manner identical to the treatment of the import duty, should not be treated any differently than an import duty. Accordingly, we have allowed the full adjustment of the duty drawback claimed in this review.

Final Results of the Review

As a result of our review, we determine that the following margins exist for the period January 1, 1989, through December 31, 1989:

Manufacturer/Exporter	Margin (Percent)
Goldstar	[1] 1.91
Samsung Electron Devices.	0.12 *de minimis*.

[1] No shipments during the review period. We assigned the all-other rate from the less than fair value investigation.

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions for each exporter directly to the Customs Service.

Furthermore, the following deposit requirements will be effective upon publication of these final results of this administrative review for all shipments of the subject merchandise from Korea entered, or withdrawn form warehouse, for consumption on or after the publication date, as provided by section

751(a)(1) of the Act: (1) The cash deposit rate for any shipments of this merchandise manufactured or exported by the remaining known manufacturers/exporters not covered in this review will continue to be at the rate published in the final determination of sales at less than fair value; (2) the cash deposit rate for Goldstar will continue to be at the all-other rate established in the less than fair value investigation; (3) no cash deposit will be required for SED since the margin found is less than 0.50 percent and, therefore, *de minimis* for cash deposit purposes; and (4) no cash deposit rate will be required for any future entries of this merchandise from a new producer and/or exporter, not covered in this or prior administrative reviews, whose first shipments occurred after December 31, 1989, and who is unrelated to any reviewed firm.

These deposit requirements are effective for all shipments of CPTs from Korea, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Act and § 353.22(c)(5) of the Department's regulations.

Dated: April 16, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91-9742 Filed 4-24-91; 8:45 am]

BILLING CODE 3510-DS-M

[A-122-401]

Red Raspberries From Canada Preliminary Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to requests from the petitioner and three respondents, the Department of Commerce has conducted an administrative review of the antidumping duty order on fresh and frozen red raspberries from Canada. The review covers twelve processors/exporters of this merchandise to the United States and the period June 1, 1989 through May 31, 1990. East Chilliwack, Marco/Landgrow, Sabolay, Pacific Coast, and BB Fruit made no shipments of raspberries to the United States during the review period. For the remaining seven processors/exporters of this merchandise to the United States, we preliminarily found margins from zero to 4.53 percent.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Sylvia Chadwick, Mark Spellun or Maria MacKay, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On June 19, 1990, the Department of Commerce (the Department) published in the Federal Register a notice of "Opportunity to Request Administrative Review" (55 FR 24918) of the antidumping duty order on certain red raspberries from Canada (50 FR 26019; June 24, 1985) for the period June 1, 1989 through May 31, 1990. During June 1990, in accordance with § 353.22 of the Commerce regulations (19 CFR 353.22 (1990)), the petitioner requested reviews of 12 exporters covering the period June 1, 1989 through May 31, 1990. At the same time three respondents, Clearbrook Packers Inc., B.C. Blueberry Cooperative Association and Mukhtiar & Sons also requested reviews for the same period. We published a notice of initiation on the twelve companies on July 26, 1990 (55 FR 30490). The Department has now conducted the administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Scope of the Review

Imports covered by these reviews are shipments of fresh and frozen red raspberries packed in bulk containers and suitable for further processing. These products are currently classifiable under the Harmonized Tariff Schedule (HTS) item numbers 0810.20.90, 0810.20.10, and 0811.20.20. The HTS item numbers are provided for convenience and Customs' purposes. The written description remains dispositive.

The review covers twelve processors/exporters of Canadian red raspberries and the period June 1, 1989 through May 31, 1990. Five processors/exporters reported no shipments during the review period.

Because Jesse did not respond to the Department's questionnaire and Berry Best did not submit information on which to base foreign market value, we used best information available (BIA) for assessment and antidumping duties/cash deposit purposes for these companies. For Jesse, BIA is their highest margin ever received under this order, which is the rate found in the original investigation. Because Berry Best has not previously been reviewed, BIA is the highest rate found for any company.

United States Price

To calculate the United States price, the Department used both purchase price and exporter's sales price as appropriate, as defined in section 772 of the Tariff Act. For those sales made directly to unrelated parties prior to importation into the United States, we based the United States price on purchase price, in accordance with section 772(b) of the Tariff Act. We calculated the purchase price based on the f.o.b. plant and f.o.b. U.S. cold storage packed price. We made deductions, where applicable, for brokerage/handling and inland freight.

Where sales to the first unrelated purchaser occurred after importation into the United States, we based United States price on exporter's sales price (ESP), in accordance with section 772(c) of the Tariff Act. We calculated the exporter's sales price based on the f.o.b. cold storage packed price. We made deductions, where applicable, for brokerage/handling, inland freight, credit expenses, commissions to unrelated agents, and indirect selling expenses.

Foreign Market Value

The Department used home market price to calculate foreign market value in accordance with section 773(b) of the Act since sufficient quantities of such or similar merchandise were sold in the home market to provide a basis for comparison. Home market price was based on f.o.b. plant and f.o.b. cold storage packed price to unrelated purchasers in the home market. We made adjustments, where applicable, for foreign inland freight, credit expenses, commissions, discounts, indirect selling expenses to offset commissions, and differences in merchandise and packing. When ESP was used as United States price, we also made adjustments to the home market price for indirect selling expenses to offset U.S. indirect selling expenses.

Preliminary Results of the Review

As a result of our comparison of United States price to foreign market value, we preliminarily determine that the following margins exist for the review period:

Processor/Exporters	Margin (Percent) 6/ 1/89–5/31/ 90
BB Fruit Packing [1]	
BC Blueberry Co-op	0
Berry Best	22.76
Clearbrook Packers	0.07
East Chilliwack Fruit Growers Co-op [1]	
Jesse Processing, Ltd	22.76
Marco Estates/Landgrow [1]	
Mukhtiar & Sons	0
Pacific Coast Fruit Products [1]	
Sabolay [1]	
Universal Packers	4.53
Valley Berries	1.77

[1] No shipments reported during the review period.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided for by section 751(a)(i) of the Tariff Act, a cash deposit of estimated antidumping duties based on the above margins will be required for these processors/exporters. Since B.C. Blueberry and Mukhtiar & Sons had no margins, no cash deposit will be required for these processors/exporters. For shipments from the remaining known processors/exporters not covered by this review, the cash deposit will continue to be at the latest rate applicable to each of those firms. For all other processors/exporters of this merchandise, the cash deposit rate shall be 4.53 percent. This is the highest non-BIA rate for any firm included in this review with shipments during the period. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Parties to the proceeding may request disclosure and interested parties may request a hearing not later than 10 days after publication of this notice. Interested parties may submit written arguments in case briefs on these preliminary results within 30 days of the date of publication. Rebuttal briefs, limited to arguments raised in case briefs, may be submitted seven days after the time limit for filing the case brief. Any hearing, if requested, will be held seven days after the schedule date for submission of rebuttal briefs. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR 353.38(e).

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under 19 CFR 353.38(c), are due.

The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated April 16, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91–9741 Filed 4–24–91; 8:45 am]

BILLING CODE 3510–DS–M

[A–538–802]

Initiation of Antidumping Duty Investigation: Shop Towels From Bangladesh

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce (the Department), we are initiating an antidumping duty investigation to determine whether imports of shop towels from Bangladesh are being, or are likely to be, sold in the United States at less than fair value. We are notifying the U.S. International Trade Commission (ITC) of this action so that it may determine whether imports of shop towels from Bangladesh are materially injuring, or threaten material injury to, a U.S. industry. If this investigation proceeds normally, the ITC will make its preliminary determination on or before May 13, 1991. If that determination is affirmative, we will make our preliminary determination on or before September 5, 1991.

EFFECTIVE DATE: April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or John Beck, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 377–8830 or (202) 377–3464, respectively.

SUPPLEMENTARY INFORMATION:

The Petition

On March 29, 1991, we received a petition filed in proper form by Milliken & Company, on behalf of the United States industry producing shop towels. In compliance with the filing requirements of 19 CFR 353.12, petitioner alleges that imports of shop towels from Bangladesh are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports are materially injuring, or threaten material injury to, a U.S. industry.

Petitioner has stated that it has standing to file the petition because it is an interested party, as defined under section 771(9) of the Act, and because it has filed the petition on behalf of the U.S. Industry producing the product that is subject to this investigation. If any interested party, as described under paragraphs (C), (D), (E), or (F) of section 771(9) of the Act, wishes to register support for, or opposition to, this petition, please file written notification with the Assistant Secretary for Import Administration.

Any producer or reseller seeking exclusion from a potential antidumping duty order must submit its request for exclusion within 30 days of the date of the publication of this notice. The procedures and requirements regarding the filing of such requests are contained in 19 CFR 353.14.

United States Price and Foreign Market Value

Rather than base its allegations on prices charged in the U.S. and the home market, petitioner calculated estimated dumping margins by comparing the aggregate sales and cost values contained in the financial statements of five Bangladeshi shop towel producers. Arguing that (1) shop towels account for either all or virtually all of each company's production, and (2) each company exports all or virtually all its production to the United States, petitioner contends that the documented net operating losses of each of the five companies is sufficient to support its allegations of sales at less than fair value. Based on our analysis of petitioner's methodology, we have accepted the methodology as it applies to Shabnam Textiles (Shabnam), but have rejected it for Sonar Cotton Mills (Bangladesh) Ltd. (Sonar), Greyfab (Bangladesh) Ltd. (Greyfab), Eagle Star Mills, Ltd. (Eagle Star), and Khaled Textile Mills Ltd. (Khaled).

With respect to Shabnam, the latest financial statement contained in the

petition indicates that: (1) Shabnam only produced shop towels; (2) Shabnam sold these shop towels only to the United States; and (3) Shabnam operated at a loss. Since Shabnam's cost of production (COP) figure only includes those costs related to the production of shop towels, we believe that petitioner's use of an aggregate cost value from the financial statement in its margin calculations is acceptable. As a result, we are using the 13 percent margin calculated for Shabnam as the basis for initiating this investigation.

To calculate an aggregate U.S. sales value for Shabnam, petitioner deducted movement expenses from the C&F price contained in the company's financial statements.

To calculate a constructed value for Shabnam, petitioner deducted movement expenses which were included in the cost of production contained in the company's financial statements. Petitioner also added an amount for actual selling, general and administrative expenses contained in the company's financial statements. Finally, petitioner added the minimum statutory profit of eight percent.

With respect to Sonar, Greyfab, and Eagle Star, the latest financial statements of these companies contained in the petition indicate that these companies produced and exported to the United States other products in additon to shop towels. With respect to Khaled, there is no evidence on the record that this company produced and exported to the United States only shop towels during the period covered by its latest financial statement. Therefore, for these four companies, we do not believe that petitioner's use of aggregate COP values from the financial statements in its margin calculations for foreign market value is appropriate. This is because the COP figure for these companies includes (in the case of Sonar, Greyfab, and Eagle Star) or could include (in the case of Khaled) costs for the production of products other than shop towels. Even if an adjustment were to be made to the COP to account for the percentage of shop towel exports only, these figures are not reliable since there may be differences in the costs of the products produced.

On April 15, 1991, petitioner supplemented the petition by providing unit price and cost data. Petitioner based the unit price on official Department statistics and the unit cost data on its 1990 budgeted cost of producing shop towels. We have not accepted the methodology contained in the supplement since petitioner used budgeted costs rather than actual costs and since petitioner provided no support documentation for these costs.

Initiation of Investigation

Under Section 732(c) of the Act, the Department must determine, within 20 days after a petition is filled whether the petition sets forth the allegations necessary for the imposition of a duty under section 731 of the Act, and whether the petition contains information reasonably available to the petitioner supporting the allegations. We have examined the petition on shop towels from Bangladesh and found that it meets the requirements of section 732(b) of the Act. Therefore, in accordance with section 732 of the Act, we are initiating an antidumping duty investigation to determine whether imports of shop towels from Bangladesh are being, or are likely to be, sold in the United States at less than fair value. If our investigation proceeds normally, we will make our preliminary determination by November 19, 1991.

Scope of Investigation

The product covered by this investigation is shop towels. Shop towels are absorbent industrial wiping cloths made from a loosely woven fabric. The fabric may be either 100 percent cotton or a blend of materials. Shop towels are currently provided for in subheadings 6307.10.2005 and 6307.2015 of the Harmonized Tariff Schedule (HTS). The HTS subheadings are provided for convenience and customs purposes. The written description remains dispositive.

ITC Notification

Section 732(d) of the Act requires us to notify the ITC of this action and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all non-privileged and nonproprietary information. We will allow the ITC access to all privileged and business proprietary information in the Department's files, provided the ITC confirms in writing that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Deputy Assistant Secretary for Investigations, Import Administration.

Preliminary Determination by ITC

The ITC will determine by May 13, 1991, whether there is a reasonable indication that imports of shop towels from Bangladesh are materially injuring, or threaten material injury to, a U.S. industry. If its determination is negative, the investigation will be terminated. Otherwise, the Department will make its preliminary determination on or before September 5, 1991.

This notice is published pursuant to section 732 (c)(2) of the Act and § 353.13(b) of the Department's regulations.

Dated: April 18, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91-9740 Filed 4-24-91; 8:45 am]

BILLING CODE 3510-DS-M

[C-357-404]

Certain Apparel From Argentina Preliminary Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of Preliminary Results of Countervailing Duty Administrative Review.

SUMMARY: The Department of Commerce has conducted an administrative review of the countervailing duty order on certain apparel from Argentina for the review period January 1, 1989 through December 31, 1989. We preliminarily determine the total bounty or grant to be 2.24 percent *ad valorem*. We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Christopher Beach or Maria MacKay, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On March 28, 1990, the Department of Commerce (the Department) published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" (55 FR 11417) of the countervailing duty order on certain apparel from Argentina (48 FR 9846; March 12, 1985) for the period January 1, 1989 through December 31, 1989. On March 27 and 30, 1990, Merchant Export, S.A., FBM S.R.L., Protheo S.A., Desatex S.A., Four Seasons Wear, Inc., Federacion de Industrias Textiles Argentinas (FITA) and Alpargatas, S.A.I.C., all respondents in this case, requested an administrative review of the order. We published the initiation of the administrative review on April 27, 1990 (55 FR 17792). The Department has

now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act). The Department published the final results of the last administrative review on May 24, 1988 (54 FR 22466).

Scope of Review

Imports covered by this review are shipments of apparel from Argentina as described under the following item numbers of the 1987 Tariff Schedules of the United States Annotated (TSUSA):

372.7540, 374.2500, 374.3530, 374.6500, 376.2830, 381.0540, 381.0542, 381.0546, 381.4130, 381.4160, 381.4770, 381.5650, 381.6240, 381.8930, 381.9035, 381.9540, 381.9547, 381.9549, 381.9585, 384.0207, 384.0208, 384.0212, 384.0237, 384.0239, 384.0320, 384.0330, 384.0340, 384.0350, 384.0360, 384.0370, 384.0407, 384.0408, 384.0415, 384.0416, 384.0423, 384.0424, 384.0437, 384.0438, 384.0439, 384.0441, 384.0442, 384.0444, 384.0451, 384.0497, 384.0608, 384.0805, 384.0810, 384.0815, 384.0820, 384.0825, 384.0905, 384.0943, 384.0945, 384.1000, 384.1319, 384.1321, 384.1611, 384.1612, 384.1613, 384.1680, 384.1920, 384.2105, 384.2115, 384.2120, 384.2125, 384.2205, 384.2216, 384.2816, 384.2818, 384.2821, 384.2850, 384.2910, 384.2914, 384.2915, 384.2930, 384.2934, 384.2950, 385.3752, 384.3753, 384.3777, 384.4614, 384.4647, 384.4765, 384.4925, 384.5234, 384.5275, 384.5276, 384.5277, 384.5278, 384.5279, 384.5299, 384.5526, 384.5930, 384.6310, 384.6330, 384.6340, 384.6350, 384.6360, 384.6371, 384.6372, 384.6385, 384.7010, 384.7020, 384.7215, 384.7220, 384.7510, 384.7522, 384.7528, 384.7532, 384.7534, 384.7536, 384.7538, 384.7542, 384.7544, 384.7546, 384.7548, 384.7552, 384.7554, 384.7556, 384.7558, 384.7562, 384.7595, 384.8024, 384.8025, 384.8027, 384.8073, 384.8225, 384.8300, 384.9115, 384.9445, and 704.6500.

During the review period, such merchandise was classifiable under the following item numbers of the Harmonized Tariff Schedule (HTS):

6102.20.00, 6103.22.00, 6103.23.00, 6103.29.10, 6103.42.10, 6103.43.20, 6103.49.20, 6104.13.20, 6104.22.00, 6104.29.10, 6104.41.00, 6104.42.00, 6104.43.10, 6104.43.20, 6104.44.10, 6104.44.20, 6104.51.00, 6104.53.10, 6104.61.00, 6104.62.10, 6104.62.20, 6104.63.10, 6104.63.15, 6104.69.10, 6105.10.00, 6105.20.20, 6106.10.00, 6106.20.10, 6106.90.10, 6109.10.00, 6109.90.10, 6109.90.20, 6110.10.10, 6110.10.20, 6110.20.20, 6110.30.15, 6110.30.30, 6111.10.00, 6111.20.10, 6111.20.20, 6111.20.30, 6111.20.40, 6111.20.60, 6111.30.30, 6111.30.50, 6111.90.50, 6112.19.20, 6112.31.00, 6112.41.00, 6112.49.00, 6114.20.00, 6115.19.00, 6115.20.00, 6115.91.00, 6115.93.10, 6115.99.14, 6115.99.20, 6116.91.00, 6116.93.15, 6117.90.00, 6201.12.20, 6201.92.20, 6202.11.00, 6202.13.30, 6202.91.10, 6202.91.20, 6202.92.20, 6202.93.40, 6203.21.00, 6203.22.30, 6203.41.10, 6203.42.40, 6203.43.40, 6204.11.00, 6204.13.10, 6204.19.10, 6204.21.00, 6204.22.30, 6204.31.20, 6204.32.20, 6204.33.40, 6204.39.20, 6204.41.20, 6204.42.30, 6204.43.30, 6204.44.30, 6204.51.00, 6204.52.20, 6204.53.20, 6204.53.30, 6204.59.20, 6204.59.30, 6204.61.00, 6204.62.40, 6204.63.25, 6204.69.20, 6205.10.20, 6205.20.20, 6205.30.20, 6206.20.10, 6206.20.30, 6206.30.30, 6206.40.25, 6206.40.30, 6209.10.00, 6209.20.10, 6209.20.50, 6209.30.30, 6209.90.30, 6211.12.30, 6211.41.00, 6211.42.00, 6212.10.20, 6214.30.00, 6214.40.00, 6216.00.50, 6217.10.00, and 6217.90.00.

The review covers the period January 1, 1989 through December 31, 1989 and five programs.

Analysis of Programs

(1) Rebate Upon Export of Indirect Taxes Paid (Reembolso) The reembolso is a tax rebate paid upon export and is calculated as a percentage of the f.o.b. invoice price of the exported merchandise. In our first administrative review (53 FR 1053; January 15, 1988), we determined that: (1) the reembolso is intended to operate as a rebate of both indirect taxes and import duties; (2) the government conducted a study of indirect tax incidence on inputs that are physically incorporated into the exported product; and (3) the rebate schedules are periodically revised to reflect the amount of actual duties and indirect taxes paid.

On October 16, 1986, Decree 1555/86 modified the reembolso program "to make the tax regime permanent and independent from other macroeconomic variables, responding exclusively to the concept of the refund of indirect taxes." The new decree set more precise and transparent guidelines to implement the refund of indirect taxes within the context of the new law. Rather than different rebate rates for each product or industry sector, there are now only three broad rebate levels. The rate for level I is 10 percent, level II is 12.5 percent, and level III is 15 percent. Based on the government's 1989 calculation of the tax incidence on apparel, apparel is classified in level II and received a 12.5 percent rebate in the review period. However, the effective rate of reembolso can be less than 12.5 percent because commissions paid on export sales are deducted from the f.o.b. value before the amount of the rebate is calculated.

The Department will determine that the reembolso does not confer a bounty or grant if the tax rebate does not exceed the total amount of allowable indirect taxes and import duties borne by inputs that are physically incorporated in the exported product, and indirect taxes levied at the final stage.

We preliminarily determined that the 1989 study for apparel is a reasonable calculation of the actual indirect tax incidence on apparel. We calculated the allowable tax incidence based on that study and found that indirect taxes on physically-incorporated inputs and final stage indirect taxes on apparel amounted to 9.93 percent. While the rate of reembolso allowed during the review period was 12.5 percent, the actual rebate amounted to 11.37 percent, since the reembolso rate was applied to the f.o.b. value of exports after commissions. To calculate the benefit, we compared the 11.37 percent rebate with the allowable rebate rate of 9.93 percent. On this basis, we preliminarily determine the benefit to be 1.44 percent *ad valorem*.

(2) Discounts of Foreign Currency Accounts Receivable under Circular RF–21

Administered by the Central Bank, this program provides financing for up to 80 percent of f.o.b. value of export shipments. This program allows exporters to provide financing to their foreign purchasers. Operations are documented through bills of exchange in U.S. dollars, which are discounted in the same currency by local banks. Circular RF–21 loans can be given for a maximum term of one year, with equal repayments of principal at periods not exceeding six months. Interest is paid twice a year on given dates or at the maturity of the loan.

All discounts were based on Central Bank-sourced funds until the promulgation of Communication A–1205 in June 1988. Communication A–1205, which replaced RF–21, preserved the treatment exporters received under RF–21 but allowed commercial banks to source directly from international banks as well as from the Central Bank. Because only exporters are eligible to receive these loans, we preliminarily determine that these loans are countervailable to the extent that they are provided to exporters at preferential rates.

To calculate the benefit, we compared the amount of interest paid on each loan during the review period with the amount that would have been paid on comparable short-term commercial loans available in Argentina during the review period. We are using as our benchmark the interest rate on dollar-indexed loans for non-traditional exports offered by commercial banks in Argentina under Copex 1680 because such loans were the predominant alternative source of short-term financing available in Argentina during the review period. The use of a dollar-indexed benchmark for export financing programs in Argentina is a change from our practice in prior reviews of this order. The reason for this change is fully discussed in Leather from Argentina: Final Affirmative Countervailing Duty

Determination and Countervailing Duty Order, (October 2, 1990; 55 FR 40215). For 1989, we used as our benchmark for dollar-indexed loans the average of the 1989 quarterly interest rates offered by commercial banks in Argentina. We divided the benefit by each firm's total exports of the subject merchandise to the United States. We then weight-averaged the result by each firm's share of total exports of the subject merchandise to the United States. On this basis, we preliminarily determine the benefit from this program to be 0.74 percent *ad valorem* during the review period.

(3) Pre-financing of Exports under Circular RF-153

Circular RF-153 allows exporters to receive pre-export financing from Central Bank funds in the form of dollar-indexed loans. The funds are provided by the Central Bank of Argentina and disbursed by private commercial banks. The amount of the loan can equal up to 65 percent of the f.o.b. export value if the exported merchandise is produced solely from domestically-produced inputs. The loans are denominated in U.S. dollars but are dispersed in australs. The interest on pre-export loans is payable at the end of each calendar quarter or when principal payments are made. Because only exporters are eligible to receive these loans, we preliminarily determine that these loans are countervailable to the extent that they are provided to exporters at preferential rates.

To calculate the benefit, we compared the amount of interest paid on each loan during the review period with the amount that would have been paid on comparable short-term commercial loans available in Argentina during the review period. For 1989, we used the same benchmark discussed above under Circular RF-21 loans. We divided the benefit by each firm's total exports of the subject merchandise to the United States. We then weight-averaged the result by each firm's share of total exports of the subject merchandise to the United States. On this basis, we preliminarily determine the benefit from this program to be 0.31 percent *ad valorem* during the review period.

(4) Other Programs

We examined the following programs and preliminarily determine that exporters of apparel did not use them during the review period:

A. Tax deduction under Decree 173/85

B. Exemption from Stamp Taxes under Decree 186/74

Preliminary Results of Review

As a result of our review, we preliminarily determine the total bounty or grant to be 2.24 percent *ad valorem* during the period January 1, 1989 through December 31, 1989.

Upon publication of the final results, the Department intends to instruct the Customs Service to assess countervailing duties of 2.24 percent of the f.o.b. invoice price on all shipments of this merchandise exported on or after January 1, 1989 and on or before December 31, 1989.

Further, the Department intends to instruct the Customs Service to collect cash deposits of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, of 2.24 percent of the f.o.b. invoice price on all shipments of this merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

Parties to the proceeding may request disclosure of the calculations methodology and interested parties may request a hearing not later than 10 days after the date of publication of this notice. Interested parties may submit written arguments in case briefs on these preliminary results within 30 days of the date of publication. Rebuttal briefs, limited to arguments raised in case briefs, may be submitted seven days after the time limit for filing the case brief. Any hearing, if requested, will be held seven days after the scheduled date for submission of rebuttal briefs. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with § 55.38(e). Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under § 355.38(c), are due. The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1675 (a)(1)) and 19 CFR 355.22.

Dated: April 18, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91-9744 Filed 4-24-91; 8:45 am]

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[C-401-401]

Certain Carbon Steel Products From Sweden; Preliminary Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of Preliminary Results of Countervailing Duty Administrative Review.

SUMMARY: The Department of Commerce has conducted an administrative review of the countervailing duty order on certain carbon steel products from Sweden for the period January 1, 1987 through December 31, 1987. We preliminarily determine the net subsidy to be 2.19 percent *ad valorem*. We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Paul McGarr, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On September 30, 1988, the Department of Commerce (the Department) published in the Federal Register a notice of "Opportunity to Request Administrative Review" (53 FR 38314) of the countervailing duty order on certain carbon steel products from Sweden (50 FR 41547; October 4, 1985). On October 31, 1988, Svenskt Staal AB, the respondent requested an administrative review of the order. We initiated the review, covering the period January 1, 1987 through December 31, 1987, on December 5, 1988 (53 FR 48951). The Department has now conducted that review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Scope of Review

Imports covered by this review are shipments from Sweden of cold-rolled carbon steel flat-rolled products, whether or not corrugated or crimped; whether or not pickled, not cut, not pressed and not stamped to non-rectangular shape; not coated or plated with metal and not clad; over 12 inches in width and of any thickness; whether or not in coils. During the review period, such merchandise was classifiable under item numbers 607.8320, 607.8350, 607.8355 and 607.8360 of the Tariff

Schedules of the United States Annotated (TSUSA). This merchandise is currently classifiable under item numbers 7209.11.00, 7209.12.00, 7209.13.00, 7209.21.00, 7209.22.00, 7209.23.00, 7209.24.50, 7209.31.00, 7209.32.00, 7209.33.00, 7209.34.00, 7209.41.00, 7209.43.00, 7209.44.00, 7209.90.00, 7211.30.50, 7211.41.70, and 7211.49.50 of the Harmonized Tariff Schedule (HTS). The TSUSA and HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers the period January 1, 1987 through December 31, 1987 and ten programs. Svenskt Staal AB (SSAB) was the only Swedish exporter of the subject merchandise to the United States during the review period.

Analysis of Programs

(1) Regional Development Incentives

The Government of Sweden allocates funds to country administrative boards for regional development and employment incentives to firms conducting business in specified regions. The regional development incentives are intended to compensate firms for the additional costs connected with business activities in those areas. The incentives consist of location-of-industry loans and grants, freight relief, regional investment projects, employment and training grants, and other miscellaneous grants. Except for the employment and training grants, which are not limited to particular regions or specific industries, we consider these incentives to be countervailable because they are provided to particular regions or specific industries. SSAB did not receive location-of-industry loans or grants during the review period but received location-of-industry grants in every year between 1979 and 1985, and a long-term variable interest rate location-of-industry loan in 1983. In the last administrative review (53 FR 35884), we determined that the location-of-industry loan was not countervailable because the interest rate was higher than our benchmark rate. SSAB also did not receive freight relief on exports of the subject merchandise during the review period, and freight relief received in prior years was expensed in the year of receipt.

For the location-of-industry grants, we used a declining balance methodology to measure the benefit. We allocated the benefits from each grant over 15 years, the average useful life of assets in the steel industry, according to the asset guideline classes of the Internal Revenue Service. For each grant, we used as the discount rate SSAB's weighted-average cost of capital in the year of receipt. We divided the total benefit allocated to 1987 by SSAB's total sales in 1987. On this basis, we preliminarily determine the benefit from this program to be 0.07 percent *ad valorem*.

(2) Reconstruction Loans

The Government of Sweden provided reconstruction loans to SSAB between 1979 and 1985. The initial reconstruction loans were intended to cover expected operating losses during the 1978–1982 restructuring period. Subsequent reconstruction loans were granted for employment promotion and investment in certain plants and equipment. These loans were interest free for three years, after which they carried an interest rate of either 9.5 percent or 11.5 percent. Up to half of the loan amount could be written off after the second calendar year following the disbursement. The remainder of the loan may be forgiven in its entirety at the end of the ninth calendar year after disbursement. Principal and interest payments on the outstanding loans are required only if SSAB pays dividends to its shareholders. Each year that a dividend is declared, SSAB is obligated to make a payment in an equal amount to the government. In 1987, SSAB made a payment on reconstruction loans equivalent to the total dividend paid in that year.

Because these loans were authorized under special government legislation and were given to SSAB on terms inconsistent with commercial considerations, we preliminarily determine that they are countervailable.

To calculate the benefit, we treated the portions of the reconstruction loans that were written off through 1987 as grants and used the grant methodology and discount rates described in section one. We treated the outstanding loan balance as of January 1, 1987 as a series of short-term loans because the loans bear a variable interest rate that changes each year. We divided the sum of the grant and loan benefits by the value of SSAB's total sales in 1987. On this basis, we preliminarily determine the benefit from this program to be 0.66 percent *ad valorem*.

(3) Structural Loans

Between 1978 and 1983, SSAB received structural loans from the Swedish government for invesment in plant and equipment. Two loans carried a 5 percent fixed interest rate for the entire 25-year term, and the remaining eight loans carried interest rates that are fixed every five years over the 25-year term. The five-year fixed interest rate is adjusted based on the prevailing state loan interest rate plus a margin. The rates on these structural loans during the review period ranged from 8.75 percent to 12.25 percent, all of which were below our benchmark rates.

All of the structural loans are interest free for the first three years, and the unpaid interest is not capitalized. There is no repayment of principal during the first five years, after which the principal is repaid in twenty equal installments at the end of each calendar year.

To calculate the benefit from the 25-year fixed rate loans, we compared the difference between the annual payment of principal and interest actually made and the annual payment of principal and interest that SSAB would have made if it had not received preferential interest rates. We then calculated the "grant equivalent" of the loan, which is the discounted value, at the time the preferential loan is made, of all the annual benefits that accrue during the life of the loan.

We treated the 25-year loans with readjustable five-year fixed rates as a series of five-year loans and, instead of calculating the grant equivalent for the entire life of the loan, we calculated discrete grant equivalents for each five-year period. We calculated the annual payment differentials using the benchmark and loan rates prevailing at the beginning of each five-year period. We then set the grant equivalent equal to the sum of the discounted payment differentials. In order to account for the effect on the entire loan of the uncapitalized interest from the three-year interest grace period, we calculated a separate grant equivalent for the interest benefits that accrued during the grace period and allocated that amount over the 25-year term of the loan.

We allocated the grant equivalents from both the five-year and 25-year fixed rate loans using the declining balance methodology. We divided the total benefit allocated to 1987 by SSAB's total sales in 1987. On this basis, we preliminarily determine the benefit from the structural loans to be 0.64 percent *ad valorem*.

(4) Government Equity Infusions

SSAB received an equity infusion from the Government of Sweden at the time of its formation in 1978, and again in 1981 when additional equity was required. We previously determined that SSAB was unequityworthy in those years. There have been no government equity infusions since 1981.

In 1981, Granges AB, a privately-owned company, also bought 375 MSEK (million Swedish kronor) of additional

stock in order to maintain its 25-percent ownership share in SSAB. At the time, Granges' prior investment was basically worthless because of accrued losses, including those offset by the write-off of reconstruction loans. Granges acquired the new stock with the understanding that the Swedish government would guarantee a specified sum in 1991 if Granges chose to sell its shares in SSAB. The government's offer was equivalent to a guaranteed annual rate of return of 9.5 percent on Granges' investment. In our last administrative review (54 FR 31716), we determined that this transaction amounted to an equity infusion that the Swedish government provided indirectly (through Granges) to SSAB. In December 1986, the Swedish government paid Granges 600 MSEK for its 25-percent share in SSAB, which represented a 9.5 percent rate of return on the 375 MSEK invested in 1981. With the purchase of Granges' share in SSAB, the Government of Sweden owned 100 percent of SSAB's shares.

In 1987, the Government of Sweden sold one-third of its shares in SSAB to private investors. The price of the shares were valued based on SSAB's earnings trend, risk, potential return on investment and the price/earnings ratio. The acquisition and sale of SSAB's stock, which SSAB did not participate in, did not provide additional equity to SSAB and did not affect the company's financial condition.

We calculated the benefit from government equity infusions by deducting the one-third share of stock that the government sold from the total equity infusion that SSAB received in 1978 and 1981, because the reduction in the government's equity claim in SSAB resulted in a corresponding decrease in its claim on SSAB's earnings. Accordingly, we multiplied the remaining two-thirds share that the government retained by the 1987 rate of return shortfall. The shortfall is the difference between the national average rate of return on equity (8.30 percent) and SSAB's 1987 rate of return on equity (6.00 percent). We then subtracted the amount of dividends paid to the government in 1987 from the shortfall and divided the result by SSAB's total sales in 1987. On this basis, we preliminarily determine the benefit from this program to be 0.14 percent *ad valorem*.

(5) Government Acquisition of Assets for SSAB

A. In 1978, Granges transferred its plant, equipment and mining operations valued at 700 MSEK to SSAB in return for a 25 percent share of SSAB's stock. In doing so, Granges incurred losses (in its financial statements) because the book value of the transferred assets was higher than the 700 MSEK value received by Granges in SSAB stock. The Swedish government in Bill 1977/78:87 proposed that Granges' losses be covered by SSAB's payment of 480 MSEK to Granges for its railway operation.

SSAB took over Granges's railway operation, TGOJ, by paying Granges 343.3 MSEK for its TGOJ shares. SSAB effected this payment to Granges in the form of a promissory note issued by the Government of Sweden and made available to SSAB for the purposes of this acquisition. The terms of the promissory note was 12 years at 8.25 percent interest. SSAB signed over the note to Granges and payments have been made directly to Granges by the Swedish government. Additionally, SSAB took over TGOJ pension liabilities of 136.7 MSEK because, according to SSAB's formation agreement, SSAB succeeded the contracting parties in those contractual and legal relationships that were bound up with the businesses that were taken over. SSAB recorded the transaction in its financial statement and notes as 8,000 shares in TGOJ valued at 1 Swedish kronor. The 343.3 MSEK promissory note was recorded as a grant in other revenues and concurrently as an extraordinary expense, thereby negating the transaction.

At the end of 1982, SSAB transferred 4,000 shares (50 percent ownership) of TGOJ to the Swedish government without remuneration. The remaining shares were to be transferred to the government in 1989 for a total price of 1 Swedish kronor.

B. Norrbottens Jarnverk AB (NJA), a wholly-owned government company, contributed steel assets valued at 700 MSEK in 1978 to SSAB in return for 25 percent share of stock. The book value of the transferred assets was higher than the transfer price. The Swedish government in Bill 1977/78:87 proposed to cover NJA's loss resulting from NJA's sale of assets to SSAB by issuing a promissory note to Statsforetag, NJA's parent company, in the amount of 530 MSEK on NJA's behalf.

We preliminarily determine that the government of Sweden's payment to Granges for the railway, TGOJ, was a grant which bestowed a countervailable benefit to SSAB. SSAB was relieved from a debt that it otherwise would have had to pay absent government intervention. We also preliminarily determine that the government's payment of 530 MSEK to Statsforetag on NJA's behalf was a grant which bestowed a countervailable benefit on SSAB because the government assumed the cost of the acquisition of assets for SSAB.

Using our declining balance grant methodology, we allocated the grants over 15 years, using the 1978 weighted-average cost of capital for SSAB as the discount rate. We divided the result by SSAB's total sales in 1987. On this basis, we preliminarily determine the benefit to be 0.62 *ad valorem*.

(6) Research and Development Grants

The Swedish Board for Technical Development provides research and development loans and grants to Swedish industries for research and development purposes. Repayment is conditional upon the success of the project. Because these funds were provided to a specific industry on terms inconsistent with commercial considerations and we do not have evidence that the results of the research and development programs were made available to the public, we preliminarily determine that they are countervailable. Under this program, SSAB received grants from 1979 through 1984 and in 1987. SSAB also received a loan in 1980 that remained outstanding in 1987.

We used the grant and long-term loan methodologies described in section two to calculate the benefit. We divided the sum of these benefits by SSAB's total sales in 1987. On this basis, we preliminarily determine the benefit from this program to be 0.02 percent *ad valorem*.

(7) Employment Promotion Grants

The Swedish Parliament passed Government Bill 1976/77:95 in March 1977 in response to the general economic downturn in Sweden.

The Bill provided employment grants to be paid to companies recognized as dominant employers in particular communities. In order to prevent layoffs, these grants were designed to cover 75 percent of the wages and salaries of surplus workers who performed work at the company that was unrelated to direct production. The Government of Sweden passed several overlapping bills that made this program available to all industries throughout Sweden. However, the Swedish government did not provide a breakdown of the industries that used the program and what the proportion of the benefits were to each industry. Moreover, SSAB did not provide information demonstrating that it was not relieved of any obligations that otherwise would have been incurred absent grants under this program.

Therefore, as best information available, we conclude that the Government of Sweden assumed costs that SSAB otherwise would have had to pay and preliminarily determine that this program confers a countervailable domestic subsidy.

To calculate the subsidy from the program, we used the grant methodology described in section one. We divided the benefit by SSAB's total sales in 1987. On this basis, we preliminarily determine the benefit from this program to be 0.04 percent *ad valorem*.

(8) Other Programs

We also examined the following programs and preliminarily determine that SSAB did not use them during the period of review:

(A) Government Export Credits
(B) Municipal and County Subsidies; and
(C) Government Restructuring Program for the Specialty Steel Industry

Preliminary Results of Review

As a result of our review, we preliminarily determine the net subsidy to be 2.19 percent *ad valorem* for the period January 1, 1987 through December 31, 1987.

The Department intends to instruct the Customs Service to assess countervailing duties of 2.19 percent of the f.o.b. invoice price on all shipments of this merchandise exported on or after January 1, 1987 and on or before December 31, 1987, except for Surahammars Bruks AB, which is excluded from the order.

Further, the Department intends to instruct the Customs Service to collect a cash deposit of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, of 2.19 percent of the f.o.b. invoice price on all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

Parties to the proceeding may request disclosure of the calculations methodology and interested parties may request a hearing not later than 10 days after the date of publication of this notice. Interested parties may submit written arguments in case briefs on these preliminary results within 30 days of the date of publication. Rebuttal briefs, limited to arguments raised in case briefs, may be submitted seven days after the time limit for filing the case brief. Any hearing, if requested, will be held seven days after the scheduled date for submission or rebuttal briefs. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR 355.38(e). Any request for disclosure under an administrative protective order must be made no later than five days after the date of publication. The Department will publish the final results of its analysis of issues raised in any such written comment or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.22.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91-9743 Filed 4-24-91; 8:45 am]

BILLING CODE 3510-DS-M

[C-201-013]

Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Changed Circumstances Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Notice of final results of changed circumstances countervailing duty administrative review and revocation of countervailing duty order.

SUMMARY: On March 12, 1991, the Department of Commerce published the initiation and preliminary results of its changed circumstances administrative review and intent to revoke the countervailing duty order on portland hydraulic cement and cement clinker from Mexico. We have now completed that review and determine to revoke the countervailing duty order effective August 24, 1986.

EFFECTIVE DATE: April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Christopher Beach or Maria MacKay, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On March 12, 1991, the Department of Commerce (the Department) published in the **Federal Register** (56 FR 10415) the initiation and preliminary results of its changed circumstances administrative review and intent to revoke the countervailing duty order on portland hydraulic cement and cement clinker from Mexico (48 FR 43063; September 21, 1983). The Department has now completed that review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Scope of Review

Imports covered by this review are shipments of Mexican portland hydraulic cement and cement clinker other than white, non-staining. Through 1988, such merchandise was classifiable under item numbers 511.1420 and 511.1440 of the Tariff Schedules of the United States Annotated (TSUSA). This merchandise is currently classifiable under item numbers 2523.10.00, 2523.29.00, 2523.30.00 and 2523.90.00 of the Harmonized Tarifff Schedule (HTS). The TSUSA and HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results and intent to revoke. We received no comments.

Final results of Review and Revocation

As a result of our changed circumstances administrative review, we are revoking the countervailing duty order on portland hydraulic cement and cement clinker from Mexico. The effective date of revocation is August 24, 1986.

Therefore, the Department will instruct the Customs Service to terminate the suspension of liquidation requirement and refund any cash deposits of estimated countervailing duties made on any shipment of this merchandise entered or withdrawn from warehouse, for consumption on or after August 24, 1986.

Further, as a consequence of this revocation, the administrative reviews of calendar year 1987 initiated on December 5, 1988 (53 FR 48951), calendar year 1988 initiated on October 24, 1989 (54 FR 43438) and calendar year 1989 initiated on October 26, 1990 (55 FR 43153) are terminated.

This changed circumstances administrative review, revocation and notice are in accordance with sections 751 (b) and (c) of the Tariff Act (19 U.S.C. 1675 (b) and (c)) and 19 CFR 355.22 and 355.25.

Dated: April 18, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91-9745 Filed 4-24-91; 8:45 am]

BILLING CODE 3510-DS-M

Department of the Interior, et al.; Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in room 4204, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket number: 90–153R. *Applicant:* Department of the Interior, Albany, NY 12201. *Instrument:* Electromagnetic Induction Logger, Model EM 39. *Manufacturer:* Geonics Ltd., Canada. *Intended use:* See notice at 55 FR 35162, August 28, 1990. *Reasons:* The foreign instrument provides sensitivity to soil conductivity changes in a region outside a well borehole at depths from 20 to 500 feet. *Advice received from:* Department of Agriculture, February 12, 1991.

Docket number 90–154. *Applicant:* University of Colorado Health Sciences Center, Denver, CO 80262. *Intended use:* See notice at 55 FR 35163, August 28, 1990.

Docket number: 90–167. *Applicant:* President and Fellows of Harvard College, Boston, MA 02115. *Intended use:* See notice at 55 FR 41736, October 15, 1990.

Instrument: Stopped-Flow Spectrofluorimeter, Model SF.17MV. *Manufacturer:* Applied Photophysics Ltd., United Kingdom. *Reasons:* The foreign instrument provides: (1) sub-millisecond deadtime, (2) a sample rate of 100 points/ms and (3) quench capability. *Advice submitted by:* National Institutes of Health, January 23, 1991.

Docket number: 90–158. *Applicant:* Louisiana State University, Baton Rouge, LA 70803. *Instrument:* MC 100 Microcell and Model 781 Oxygen Meter. *Manufacturer:* Srathkelvin Instruments, United Kingdom. *Intended use:* See notice at 55 FR 41739, October 15, 1990. *Reasons:* The foreign instrument provides in situ measurements of oxygen for small sample volumes (to 1 ml) with a response time of less than 10 seconds and a sensitivity of 0.01 mg/1. *Advice submitted by:* National Institutes of Health, January 23, 1991.

The U.S. Department of Agriculture and The National Institutes of Health advise that (1) the capabilities of each of the foreign instruments described above are pertinent to each applicant's intended purpose and (2) they know of no domestic instrument or apparatus of equivalent scientific value for the intended use of each instrument.

We know of no other instrument or apparatus being manufactured in the United States which is of equivalent scientific value to any of the foreign instruments.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 91–9805 4–24–91; 8:45 am]

BILLING CODE 3510-DS-M

Magee-Women's Hospital; Decision on Application for Duty-Free Entry of Scientific Instrument

This decison is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in room 4204, U.S. Department of Commerce, 14th Constitution Avenue, NW., Washington, DC.

Docket Number: 90–175. *Applicant:* Magee-Women's Hospital, Pittsburgh, PA 15213. *Instrument:* Specialized Computer Hardware and Software for Imaging. *Manufacturer:* Image Recognition System, United Kingdom. *Intended Use:* See notice at 55 FR 42620, October 22, 1990.

Comments: None received.

Decision: Denied.

Reasons: In its response to questions 7(a) and (b) of the application form, the applicant stated, "The intended use of this equipment is for clinical laboratory diagnostic procedures not for research or science-related education purposes." (Emphasis is the applicant's.) The Departments' joint regulations provide as follows:

> In order for the Director to make a determination with respect to the "scientific equivalency" of the foreign and domestic instruments, the applicant's intended purposes must include either scientific research or science-related educational programs. Instruments used exclusively for nonscientific purposes have no scientific value, thereby precluding the requisite finding by the Director with respect to "whether an instrument or apparatus of equivalent scientific value to such article, for the purposes for which the article is intended to be used, is being manufactured in the United States." In such cases the Director *shall* deny the application for the reason that the instrument has no scientific value for the purposes for which it is intended to be used. Examples of nonscientific purposes would be the use of an instrument in routine diagnosis or patient care and therapy (as opposed to clinical research). . . . (15 CFR Part 301.5(d)(1)(iii); emphasis supplied).

Furthermore, 15 CFR 301.5(e)(7) provides, in part, as follows:

> Information provided in a resubmission that . . . contradicts or conflicts with information provided in a prior submission, shall not be considered in making the decision on an application that has been resubmitted. Accordingly, an applicant may elect to reinforce an original submission by elaborating in the resubmission on the description of the purposes contained in a prior submission and may supply additional examples, documentation and/or other clarifying detail, *but the applicant shall not introduce new purposes or other material changes* in the nature of the original application. (Emphasis supplied.)

Consequently, in view of the applicant's categorical statement, cited above, we conclude that affording the applicant an opportunity to resubmit its application cannot result in a statement of purposes both consonant with the regulations and permitting a finding by the Director as to scientific equivalency. The application is denied "for the reason that the instrument has no scientific value for the purposes for which it is intended to be used."

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 91–9806 Filed 4–24–91; 8:45 am]

BILLING CODE 3510-DS-M

Pennsylvania State University, et al.; Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Public Law 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in room 2841, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket Number: 90–199. *Applicant:* The Pennsylvania State University, Abington, PA 19002. *Instrument:* Hi-Plan 2 Structures Apparatus Teaching Aid. *Manufacturer:* Hi-Tech Ltd, United Kingdom. *Intended use:* See notice at 55

FR 50857, Decembe. 11, 1990. *Reasons:* The foreign apparatus facilitates theory of structure and strength of materials studies. *Advice received from:* National Institute of Standards and Technology, February 8, 1991.

Docket Number: 90–216. *Applicant:* State University of New York, Stony Brook, NY 11794. *Instrument:* Tandem Fabry-Perot Interferometer. *Manufacturer:* J.R. Sandercock, Switzerland. *Intended use:* See notice at 56 FR 1512, January 15, 1991. *Reasons:* The foreign instrument provides a 3-pass dynamically isolated tandem system with contrast in the range 10^9 to 10^{11} and optimal dynamic range with minimal drift. *Advice received from:* National Institute of Standards and Technology, February 22, 1991.

Docket Number: 90–217. *Applicant:* University of Wisconsin-Oshkosh, Oshkosh, WI 54901. *Instrument:* Ground Conductivity Meter, Model EM–34–3–DL. *Manufacturer:* Geonics, Canada. *Intended use:* See notice at 56 FR 1512, January 15, 1991. *Reasons:* The foreign instrument provides battery-powered measurements of ground conductivity by electromagnetic induction to a depth of 30m in the vertical coplanar mode. *Advice received from:* Department of Agriculture, February 12, 1990.

The National Institute of Standards and Technology and the U.S. Department of Agriculture advise that (1) the capabilities of each of the foreign instruments described above are pertinent to each applicant's intended purpose and (2) they know of no domestic instrument or apparatus of equivalent scientific value for the intended use of each instrument.

We know of no other instrument or apparatus being manufactured in the United States which is of equivalent scientific value to any of the foreign instruments.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 91–9807 Filed 4–24–91; 8:45 am]

BILLING CODE 3510–DS–M

Texas A&M University, et al.; Consolidated Decision on Applications for Duty-Free Entry of Electron Microscopes

This is a decision consolidated pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in room 4204, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 90–204. *Applicant:* Texas A&M University, College Station TX 77843–2257. *Instrument:* Electron Microscope, Model JEM 2010/SEG/SIP/DP. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* See notice at 55 FR 50857, December 11, 1990. *Order Date:* August 31, 1990.

Docket Number: 90–207. *Applicant:* U.S. Naval Research Laboratory, Washington, DC 20357–5000. *Instrument:* Electron Microscope, Model CM30. *Manufacturer:* N.V. Philips, The Netherlands. *Intended Use:* See notice at 55 FR 51752, December 17, 1990. *Order Date:* August 23, 1990.

Docket Number: 90–214. *Applicant:* Argonne National Laboratory, Argonne, IL 60439. *Instrument:* Analytical Transmission Electron Microscope, Model HB603Z. *Manufacturer:* VG Instruments Inc., United Kingdom. *Intended Use:* See notice at 55 FR 51752, December 17, 1990. *Order Date:* September 1, 1988.

Docket Number: 90–215. *Applicant:* Eastern Virginia Medical School of the Medical College of Hampton Roads, Norfolk, VA 23501. *Instrument:* Electron Microscope, Model JEM 1200EXII/SEG/DP/DP. *Manufacturer:* JEOL, Japan. *Intended Use:* See notice at 56 FR 1512, January 15, 1991. *Order Date:* November 5, 1990.

Docket Number: 90–219. *Applicant:* Southwest Texas State University, San Marcos, TX 78666. *Instrument:* Electron Microscope, Model JEM 1200EXII. *Manufacturer:* JEOL, Ltd., Japan. *Intended Use:* See notice at 56 FR 1512, January 15, 1991. *Order Date:* October 15, 1990.

Docket Number: 90–221. *Applicant:* Argonne National Laboratory, Argonne, IL 60439. *Instrument:* Electron Microscope, Model JEM-4000EX-II. *Manufacturer:* JEOL, Ltd., Japan. *Intended Use:* See notice at 56 FR 1512, January 15, 1991. *Order Date:* April 3, 1990.

Docket Number: 90–229. *Applicant:* Center for Neural Science, New York, NY 10003. *Instrument:* Electron Microscope and Accessories, Model JEM 1200EXII/SEG/DP/DP. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* See notice at 56 FR 4047, February 1, 1991. *Order Date:* September 12, 1990.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered.

Reasons: Each foreign instrument is a conventional transmission electron microscope (CTEM) and is intended for research or scientific educational uses requiring a CTEM. We know of no CTEM, or any other instrument suited to these purposes, which was being manufactured in the United States either at the time of order of each instrument or at the time of receipt of application by the U.S. Customs Service.

Frank W. Creel,

Director, Import Programs Staff.

[FR Doc. 91–9808 Filed 4–24–91; 8:45 am]

BILLING CODE 3510–DS–M

University of Vermont, et al.; Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in room 4204, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket Number: 90–194. *Applicant:* University of Vermont, Burlington, VT 05405. *Instrument:* Muscle Mechanic System. *Manufacturer:* Scientific Instruments GmbH, West Germany. *Intended Use:* See notice at 55 FR 49556, November 29, 1990. *Reasons:* The foreign instrument provides measurement of the length of contractile tissue with sensitivity to velocity in the 300μ m/s range and force resolution of 0.3mg. *Advice Submitted by:* National Institutes of Health, February 21, 1991.

Docket Number: 90–197. *Applicant:* Presbyterian University Hospital, Pittsburgh, PA 15213–2582. *Instrument:* Cell Transfer System, Model Quixcell 42. *Manufacturer:* Saxon Micro, United Kingdom. *Intended Use:* See notice at 55 FR 50857, December 11, 1990. *Reasons:* The foreign instrument provides capability to automatically collect single cells in fine pipettes and to rapidly deliver each cell into a microtest well. *Advice Submitted by:* National Institutes of Health, February 21, 1991.

Docket Number: 90–201. *Applicant:* University of North Carolina at Chapel Hill, Chapel Hill, NC 27599–1100. *Instrument:* Spectrophotometer

Accessory, RX–1000/S. *Manufacturer:* Applied Photophysics, United Kingdom. *Intended Use:* See notice at 55 FR 50857, December 11, 1990. *Reasons:* The foreign article rapidly mixes and delivers fluid reactants directly to the observation cell of an existing spectrometer or spectrophotometer. *Advice Submitted by:* National Institutes of Health, February 21, 1991.

Docket Number: 90–202. *Applicant:* Woods Hold Oceanographic Institution, Woods Hole, MA 02543. *Instrument:* Curie-Point Pyrolysis Head. *Manufacturer:* F.O.M. Institute, The Netherlands. *Intended Use:* See notice at 55 FR 50857, December 11, 1990. *Reasons:* The foreign instrument provides fast rise time to a precisely controlled pyrolysis temperature with minimum temperature overshoot and small dead volume. *Advice Submitted by:* National Institutes of Health, February 21, 1991.

Docket Number: 90–203. *Applicant:* Woods Hole Oceanographic Institution, Woods Hole, MA 02543. *Instrument:* Curie-Point Pyrolysis Control Unit. *Manufacturer:* Horizon Instruments, United Kingdom. *Intended Use:* See notice at 55 FR 50857, December 11, 1990. *Reasons:* The foreign instrument provides radio frequency power to a curie-point pyrolysis head for rapid and precise heating control. *Advice Submitted by:* National Institutes of Health, February 21, 1991.

Docket Number: 90–206. *Applicant:* SUNY/College of Optometry, New York, NY 10010. *Instrument:* Infra-red Autorefractor, Model R–1. *Manufacturer:* Canon, Japan. *Intended Use:* See notice at 55 FR 50857, December 11, 1990. *Reasons:* The foreign instrument provides a measurement time of 0.2s reducing the need for rigid head fixation and unlimited selection of display targets. *Advice Submitted by:* National Institutes of Health, February 21, 1991.

The National Institutes of Health advises that (1) the capabilities of each of the foreign instruments described above are pertinent to each applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value for the intended use of each instrument.

We know of no other instrument or apparatus being manufactured in the United States which is of equivalent scientific value to any of the foreign instruments.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 91–9309 Filed 4–24–91; 8:45 am]

BILLING CODE 3510–DS–M

University of Virginia, et al.; Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in room 4204, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket Number: 90–048R. *Applicant:* University of Virginia, Charlottesville, VA 22903. *Instrument:* Mass Spectrometer, Model PRISM Series II. *Manufacturer:* VG Instruments, United Kingdom. *Intended Use:* See notice at 55 FR 14335, April 17, 1990. *Reasons:* The foreign instrument provides a cold finger microinlet for samples as small as 1.0 ml of CO_2 and an internal precision of 0.006‰ for 3 bar μl samples of CO_2. *Advice Submitted By:* National Institutes of Health, January 23, 1991.

Docket Number: 88–146R. *Applicant:* Rutgers University, Piscataway, NJ 08854. *Instrument:* Beam Tester, Model Number HST13. *Manufacturer:* Hi-Tech Scientific Ltd., United Kindom. *Intended Use:* See notice at 53 15101, April 27, 1988. *Reasons:* The foreign apparatus facilitates theory of structure and strength of materials studies. *Advice Received From:* National Institutes of Standards and Technology, February 8, 1991.

Docket Number: 90–148. *Applicant:* University of Vermont, Burlington, VT 05405. *Instrument:* Resistance Vessel Myograph & Spectrofluorescence System. *Manufacturer:* Creative Instruments, West Germany. *Intended Use:* See notice at 55 FR 35162, August 28, 1990. *Reasons:* The foreign instrument provides a resolution of 10.0 ms for determining Ca^{2+} concentration. *Advice Submitted By:* National Institutes of Health, January 23, 1991.

Docket Number: 90–149. *Applicant:* Armed Forces Radiobiology Research Institute, Bethesda, MD 20814–5145. *Instrument:* Image Analysis Hardware. *Manufacturer:* Imaging Research Institute, Canada. *Intended Use:* See notice at 55 FR 35162, August 28, 1990. *Reasons:* The foreign instrument provides an imaging system which maximizes illumination uniformity and day-to-day reproducibility. *Advice Submitted By:* National Institutes of Health, January 23, 1991.

Docket Number: 90–150. *Applicant:* Texas A&M University, College Station, TX 77843–2128. *Instrument:* Multi-mixing Stopped-Flow Spectrofluorimeter, Model DX17MV. *Manufacturer:* Applied Photophysics, Ltd., United Kindom. *Intended Use:* See notice at 55 FR 35162, August 28, 1990. *Reasons:* The foreign instrument provides: (1) Sub-millisecond deadtime, (2) quench capability and (3) fluorescence or absorbance measurement. *Advice Submitted By:* National Institutes of Health, January 23, 1991.

The National Institutes of Health and National Institute of Standards and Technology advise that (1) the capabilities of each of the foreign instruments described above are pertinent to each applicant's intended purpose and (2) they know of no domestic instrument or apparatus of equivalent scientific value for the intended use of each instrument.

We know of no other instrument or apparatus being manufactured in the United States which is of equivalent scientific value to any of the foreign instruments.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 91–9610 Filed 4–24–91; 8:45 am]

BILLING CODE 3510–DS–M

VA Medical Center; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in room 4204, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 90–178. *Applicant:* VA Medical Center, Kansas City, MO 64128. *Instrument:* Photomultiplier, Model PM–60. *Manufacturer:* Hi-Tech Ltd., United Kingdom. *Intended Use:* See notice at 55 FR 41737, October 15, 1990.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. *Reasons:* This is a compatible accessory for an instrument previously imported

for the use of the applicant. The instrument and accessory were made by the same manufacturer. The National Institutes of Health advises in its memorandum dated February 21, 1991 that the accessory is pertinent to the intended uses and that it knows of no comparable domestic accessory.

We know of no domestic accessory which can be readily adapted to the instrument.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 91-9811 Filed 4-24-91; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Spiny Lobster Fishery of Puerto Rico and the U.S. Virgin Islands

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of approval of an amendment to a fishery management plan.

SUMMARY: NOAA announces approval of Amendment 1 to the Fishery Management Plan for the Spiny Lobster Fishery of Puerto Rico and the U.S. Virgin Islands (FMP). Amendment 1 adds to the FMP (1) a scientifically measurable definition of overfishing for the spiny lobster resource and a rebuilding plan should overfishing occur, (2) a section on vessel safety, and (3) an extensive description of the habitat. Amendment 1 conforms the FMP with the revised national standard guidelines for fishery management plans and with the Magnuson Fishery Conservation and Management Act (Magnuson Act), as amended.

EFFECTIVE DATE: April 19, 1991.

FOR FURTHER INFORMATION CONTACT: William R. Turner, 813-893-3722.

SUPPLEMENTARY INFORMATION: The spiny lobster fishery of Puerto Rico and the U.S. Virgin Islands is managed under the FMP, prepared by the Caribbean Fishery Management Council (Council), and its implementing regulations at 50 CFR part 645 under the authority of the Magnuson Act. In accordance with the national standard guidelines and as required by an amendment to the Maguson Act, Amendment 1 adds to the FMP a scientifically measurable definition of overfishing and an action plan to arrest overfishing should it occur, adds to the FMP a section on vessel safety considerations, and revises the section of habitat of significance to the fishery.

Amendment 1 was submitted by the Council on January 23, 1991. A notice of availability of Amendment 1 and request for comments was published in the **Federal Register** on February 6, 1991 (56 FR 4790). No comments were received.

Under the FMP, as revised by Amendment 1, overfishing exists when the reproductive potential drops below 20 percent of that which would be available in the absence of fishing mortality. If the spawning potential ratio drops below the 20 percent level, the Council will submit a regulatory amendment to implement one or more of the following actions: Establish a seasonal closure; increase the minimum carapace length; limit the use of short lobsters as attractants; require escape gaps in traps; reduce the number of traps; or establish closed areas.

Further information on the definition of overfishing, the action plan when overfishing occurs, vessel safety considerations in the fishery, and habitat of significance to the fishery are contained in Amendment 1.

Classification

The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), determined that Amendment 1 is necessary for the conservation and management of the spiny lobster fishery of Puerto Rico and the U.S. Virgin Islands and that it is consistent with the Magnuson Act and other applicable law.

Since Amendment 1 has no implementing regulations, preparation of and conclusions based on a regulatory impact review (RIR) and a regulatory flexibility analysis (RFA), normally required by E.O. 12291 and the Regulatory Flexibility Act, are not required. It should be noted, however, that each future action initiated under the action plan to arrest overfishing, established in Amendment 1, will be accompanied by an RIR and, if such action will have a significant economic impact on a substantial number of small entities, an RFA.

As part of Amendment 1, the Council prepared an environmental assessment (EA). Based on the EA, the Assistant Administrator concluded that there will be no significant adverse impact on the human environment as a result of Amendment 1.

The Council determined that Amendment 1 is consistent to the maximum extent practicable with the approved coastal zone management programs of Puerto Rico and the U.S. Virgin Islands. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Neither state agency responded during the statutory time period; therefore, state agency agreement with the consistency determination is inferred.

Amendment 1 does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

Amendment 1 does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 19, 1991.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 91-9803 Filed 4-24-91; 8:45 am]

BILLING CODE 3510-22-M

Emergency Striped Bass Research Study; Meeting

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

SUMMARY: NMFS and the U.S. Fish and Wildlife Service will hold a joint meeting to discuss progress on the Emergency Striped Bass Research Study, as authorized by the amended Anadromous Fish Conservation Act (Pub. L. 96-118).

DATES: The meeting will convene on Thursday, June 13, 1991, at 10:00 a.m., and will adjourn at approximately 3:00 p.m. The meeting is open to the public.

ADDRESSES: Department of Commerce, NOAA, Conference Room 4246, Silver Spring Metro Center #2, 1325 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: David G. Deuel, Office of Fisheries Conservation and Management, NMFS, 1335 East-West Highway, Silver Spring, MD 20910. Telphone: (301) 427-2347.

Dated: April 22, 1991.

David S. Crestin

Acting Director, Office of Fisheries Conservation and Management, National Marnie Fisheries Service.

[FR Doc. 91-9900 Filed 4-24-91; 8:45 am]

BILLING CODE 3510-22-M

[910493-1093]

Information Relating to Bowhead Whales

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of availability of documents and request for public comment.

SUMMARY: Information is published by NOAA that is used in the development of the U.S. position to be presented before the International Whaling Commission (IWC) on the 1992–1994 aboriginal/subsistence take of bowhead whales and in the domestic allocation of the existing IWC quota for bowhead whales to U.S. natives. By this notice NOAA is advising the public of the availability of and soliciting public comment on the Administrator's initial discretionary views on (1) the current population level and annual net recruitment rate of the bowhead whale, (2) the nature and extent of the aboriginal/subsistence need for bowhead whales, and (3) the level of take of bowhead whales that is consistent with the provisions of the IWC aboriginal/subsistence whaling scheme. Also available upon request is the list of documents reviewed and used in formulating these initial views.

DATES: Written comments on the Administrator's initial views must be submitted by May 26, 1991.

ADDRESSES: The Administrator's initial views and the list of documents reviewed and used in formulating these initial views are available from Becky Rootes, Office of International Affairs, National Marine Fisheries Service, room 7276, Silver Spring Metro Center Building 1, 1335 East West Highway, Silver Spring, Maryland 20910.

FOR FURTHER INFORMATION CONTACT: Becky Rootes, Foreign Affairs Officer, Office of International Affairs, NMFS, Silver Spring, MD, 301–427–2276.

Authority: 16 U.S.C. 1361–1407, 1531–1543, 916.

Dated: April 17, 1991.

John A. Knauss,

Under Secretary for Oceans and Atmosphere.

Administrator's Initial Views on Bowhead Whale Information

March 1991.

The following information is provided to the U.S. International Whaling Commission (IWC) Interagency Committee and to the general public as the Administrator's initial views on (a) the current population level and annual net recruitment rate of the bowhead whale, (b) the nature and extent of the aboriginal/subsistence need for bowhead whales, and (c) the level of take of bowhead whales that is consistent with the provisions of the IWC aboriginal/subsistence whaling management scheme. Available upon request is the list of documents reviewed and used in formulating these views.

Current Population and Net Recruitment Rate

The IWC Scientific Committee, at the 1988 IWC meeting, agreed on an estimate of 7,800 for the bowhead whale population size. This estimate was based on visual and acoustic data from 1986. The IWC Scientific Committee reviewed two estimates of stock size each using the same data but different methodologies. The 7,800 point estimate was the weighted average of the 1986 analysis and the 1985 population estimate provided the previous year. The Scientific Committee also agreed on a 95 percent confidence interval of 5,700 to 10,600 whales.

The IWC Scientific Committee also accepted a range of replacement yields for Maximum Sustainable Yield rates of 1–5 percent, using the weighted average point estimate of population size of 7,800. The calculated replacement yields are:

Population estimate	MSY exploitation rate (%)				
	1	2	3	4	5
7,800	56	99	135	165	192

U.S. Scientists recently estimated that the bowhead whale population increased at a rate of 3.1 percent per year during 1978–1988. This increase would have been in addition to an average annual removal over that period of 22 whales for aboriginal subsistence purposes.

In summary, the current population estimate for bowhead whales is 7,800, the population has been increasing, and the range of replacement yields is 56–192 whales.

Aboriginal/Subsistence

The Department of the Interior (DOI) conducted the last major analysis of the nature and extent of Alaska Eskimo aboriginal/subsistence need for bowhead whales and whaling in 1983 and the IWC adopted this method for quantifying need in 1986. The Department of Interior contracted a new study on the quantification of subsistence and cultural need for bowhead whales in 1987 which was presented at the 1988 IWC meeting. The new study presented the cultural and subsistence need of the nine Alaska Eskimo whaling villages to take 41 landed bowhead whales. This quantification of need used the same method of calculation accepted by the IWC in 1986. This method derives the mean annual number of bowhead whales landed per capita during a specified historical period and multiplies this mean by the current Eskimo population of nine Alaska Eskimo whaling villages. The result of this calculation is the total number of bowhead whales the nine Eskimo whaling villages need to land each year.

ALASKA ESKIMO WHALING VILLAGE SUBSISTENCE AND CULTURAL NEED FOR LANDED BOWHEAD WHALES

Village	1991 bowhead whale need (landed)
Gambell	3
Savoonga	3
Wales	1
Kivalina	1
Point Hope	9
Wainwright	5
Barrow	15
Nuiqsut	2
Kaktovik	2
	41

When the IWC adopted this method of quantifying need in 1986, members of the IWC Aboriginal Subsistence Subcommittee noted that the quantification was based on a large but incomplete series of data on historical bowhead landings. It was also noted that the quantification used an inconsistent data base period. The DOI study was initiated to correct these deficiencies. To complete the series of data on historical bowhead whales landings to the extent possible, the study undertook a comprehensive review of available information on bowhead landings including data researched from repository, library, and archival sources supplemented by unpublished written and oral sources. Remaining gaps are unlikely to be significantly reduced with further searches for historic data on bowhead landings.

The data resulting from this study also permitted the use of a consistent historical base period for the calculation of need. In the prior analysis, the base periods varied from 1940 to 1970 and from 1950 to 1979. The base period now begins in 1910, the year following the cessation of commercial whaling in the Arctic, and ends in 1969, prior to the period of unusually high bowhead harvests during the unique economic circumstances of the 1970s. Therefore, applying the additional landed bowhead whale data and the longer period to the accepted method of quantifying need, results in a current cultural and subsistence need of 41 landed whales.

Level of Take Consistent with the IWC Aboriginal/Subsistence Whaling Scheme

The IWC management scheme for aboriginal/subsistence whaling provides (in Schedule paragraph 13(a)(2): "For stocks below the maximum substainable yield (MSY) level but above a certain minimum level, aboriginal/subsistence catches shall be permitted so long as they are set at a level which allows the whale stock to move to the MSY level." Given an annual replacement yield of 56–192 whales before removals by the Eskimos, and a need of 41 whales landed, a quota of 54 strikes per year for the next three years with no more than 41 whales landed in any year would allow Eskimo need to be met while also allowing recruitment into the population. Because of the often adverse environmental conditions affecting the hunt, a limited carryover provision would allow strikes not used in any year to be carried forth to the next year providing the opportunity for all villages to participate. This proposed quota allows for landing the needed 41 whales as identified by the latest needs study given an efficiency rate of 76 percent.

[FR Doc. 91–9746 Filed 4–24–91; 8:45 am]

BILLING CODE 3510–22–M

COMMISSION OF FINE ARTS

Meeting

The Commission of Fine Arts' next meeting is scheduled for Thursday, 16 May 1991 at 10 a.m. in the Commission's offices in the Pension Building, suite 312, Judiciary Square, 441 F Street NW., Washington, DC 20001 to discuss various projects affecting the appearance of Washington, DC, including buildings, memorials, parks, etc.; also matters of design referred by other agencies of the government. Handicapped persons should call the Commission offices (202–504–2200) for details concerning access to meetings.

Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Charles H. Atherton, Secretary, Commission of Fine Arts, at the above address or call the above number.

Dated in Washington, DC, 18 April 1991.

Charles H. Atherton,

Secretary.

[FR Doc. 91–9721 Filed 4–24–91; 8:45 am]

BILLING CODE 6330–01–M

DEPARTMENT OF DEFENSE

Department of the Army

Armed Forces Epidemiological Board; Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Armed Forces Epidemiological Board.

Date Meeting: 18 June 1991.

Time: 0800–1600.

Place: Walter Reed Army Institute of Research, Washington, DC.

Agenda: Review of service vaccination policies, deliberations and recommendations to retain, delete, replace or modify vaccine or immunization policy as appropriate.

This meeting will be open to the public but limited by space accommodations. Any interested person may attend, appear before or file statements with the committee at the time and in the manner permitted by the committee. Interested persons wishing to participate should advise the Executive Secretary, AFEB, Skyline Six, 5109 Leesburg Pike, room 667, Falls Church, VA 22041–3258 (703) 756–8012.

Kenneth L. Denton,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 91–9725 Filed 4–24–91; 8:45 am]

BILLING CODE 3710–08–M

United States Army Medical Research and Development Advisory Committee; Partially Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. appendix 2, sections 1–15), announcement is made of the following Committee Meeting:

Name of Committee: United States Army Medical Research and Development Advisory Committee.

Date of Meeting: 20 and 21 May 1991.

Time: 0800–1630 hours—20 May 1991, 0800–1200 hours—21 May 1991.

Place: Holiday Inn at FSK Mall, Frederick, Maryland.

Proposed Agenda: In accordance with the provisions set forth in section 552(c)(6), U.S. Code, title 5 and sections 1–15 of appendix 2, the meeting will be open to the public from 0800–1630 on 20 May 1991 and 0800–1000 on 21 May 1991. The meeting will be closed to the public from 1000–1200 on 21 May 1991 for the review, discussion and evaluation of individual programs and projects conducted by the U.S. Army Medical Research and Development Command, including consideration of personnel qualifications and performance, the competence of individual investigators, medical files of individual research subjects, and similar items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

FOR FURTHER INFORMATION CONTACT: Colonel Harry G. Dangerfield, U.S. Army Medical Research and Development Command, Fort Detrick, Frederick, Maryland 21702–5012 (301) 663–7377.

Kenneth L. Denton,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 91–9726 Filed 4–24–91; 8:45 am]

BILLING CODE 3710–08–M

Corps of Engineers, Department of the Army

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for the Proposed Kissimmee River Restoration Project in Polk, Osceola, Highlands and Okeechobee Counties, Florida

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice of Intent.

SUMMARY: A feasibility study of the Kissimmee River is authorized to evaluate implementing South Florida Water Management District's (SFWMD) Level II Backfilling Plan to restore the Kissimmee River.

FOR FURTHER ACTION CONTACT: For questions about the proposed action and DEIS contact Mr. William J. Lang, Jr., U.S. Army Engineer District, P.O. Box 4970 Jacksonville, Florida 32232–0019; telephone (904) 791–3691.

SUPPLEMENTARY INFORMATION: Under the Water Resource Development Act of November 28, 1990 (Pub. L. 101–604), section 116(h), the Corps of Engineers is authorized to conduct, " * * * a feasibility study of the Kissimmee River in central and southern Florida for the purpose of determining modifications of the flood control project for central and southern Florida, authorized by section 203 of the Flood Control Act of 1948 (62 Stat. 1176), which are necessary to provide a comprehensive plan for the environmental restoration of the Kissimmee River. The study shall be based on implementing the Level II Backfilling Plan specified in the Kissimmee River Restoration, Alternative Plan Evaluation and Preliminary Design report, dated June 1990, published by the South Florida Water Management District."

1. The Corps will examine the alternatives contained in that Report which were developed to achieve Kissimmee River restoration and will evaluate the environmental effects of

the Level II Backfilling Plan. The local sponsor for the study is the SFWMD.

2. The public will be involved in the planning process through mail solicitations and advisements. As a minimum, all parties who have expressed interest in the Kissimmee River Restoration will be invited to participate in the planning process. Federal, State and local agencies, affected Indian tribes and other interested groups will be involved in the process.

3. Significant issues identified to date which shall be addressed include effects on Federally listed threatened and endangered species and on wetland and floodplain habitat and community response to restoration of prechannelization hydrology, water quality and navigation impacts.

4. Coordination with the U.S. Fish and Wildlife Service will be accomplished in compliance with section 7 of the Endangered Species Act. Coordination required by applicable Federal and State laws and policies will be conducted. The discharge of material into waters of the United States will be required and addressed by application of the criteria of section 404(b) of the Clean Water Act.

5. A scoping meeting is not scheduled. Meetings to address discrete issues or parts or functions of the study area may be called.

6. The DEIS will be available to the public in September 1991.

Kenneth L. Denton,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 91-9727 Filed 4-24-91; 8:45 am]

BILLING CODE 3710-AJ-M

DEPARTMENT OF EDUCATION

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Office of Information Resources Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before May 28, 1991.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok: Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Mary P. Liggett, Department of Education, 400 Maryland Avenue, SW., room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Mary P. Liggett (202) 708-5174.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Acting Director, Office of Information Resources Management, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by Office, contains the following:

(1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the request are available from Mary P. Liggett at the address specified above.

Dated: April 18, 1991.

Mary P. Liggett,

Acting Director, Office of Information Resources Management.

Office of Planning, Budget and Evaluation

Type of Review: New.

Title: Evaluation of the Cooperative Demonstration Program (High Technology).

Frequency: One time only.

Affected Public: State or local governments.

Reporting Burden: Responses—220; *Burden Hours*—374.

Recordkeeping Burden: Recordkeepers—0; *Burden Hours:* 0.

Abstract: This study will obtain information about the cooperative demonstration programs in vocational education. The information collected will be used by federal policymakers to make recommendations on the future of this program.

[FR Doc. 91-9699 Filed 4-24-91; 8:45 am]

BILLING CODE 4000-01-M

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board.

ACTION: Amendment to notice of partially closed meeting.

SUMMARY: This amends the notice of a partially closed meeting of the Executive Committee of the National Assessment Governing Board published in Vol. 56, No. 71, page 14933, dated Friday, April 12, 1991. Notice of this meeting was required under section 10(a)(2) of the Federal Advisory Committee Act.

DATE: April 25, 1991.

TIME: 12 p.m. until 1 p.m. (closed).

LOCATION: National Assessment Governing Board, suite 7322, 1100 L Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Roy Truby, Executive Director, National Assessment Governing Board, suite 7322, 1100 L Street, NW., Washington, DC, 20005-4013. Telephone: (202) 357-6938.

SUPPLEMENTARY INFORMATION: In addition to the published agenda, during the closed portion of the National Assessment Governing Board's Executive Committee meeting, the members will discuss the draft work statement for the procurement of achievement levels setting in the reading, writing, and science assessments. This portion of the meeting will be closed under the authority of 10(d) of the Federal Advisory Committee Act (5 U.S.C. app. 2) and under exemption 9(B) of the Government in the Sunshine Act 5 U.S.C. 552b(c). The draft document is still undergoing technical review and has not been submitted to the Department for public release. The premature disclosure of the draft statement of work would be likely to significantly frustrate implementation of proposed agency action. Such matters are protected by 5 U.S.C. 552b(c)(9)(B). A summary of the activities at the closed session and related matters which are informative to the public consistent with the policy of Title 5 U.S.C. 552b will be available to the public within fourteen days of the meeting. Records are kept of all Board proceedings, and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, 1100 L Street, NW.,

suite 7322, Washington, DC, from 8:30 a.m. until 5:30 p.m.

Dated: April 22, 1991.

Bruno Manno,

Acting Assistant Secretary for Educational Research and Improvement.

[FR Doc. 91-9888 Filed 4-24-91; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Morgantown Energy Technology Center; Financial Assistance Award (Grant)

AGENCY: U.S. Department of Energy (DOE), Morgantown Energy Technology Center.

ACTION: Notice of noncompetitive financial assistance application for a Grant.

SUMMARY: Based upon a determination pursuant to 10 CFR 600.7(b)(2) the DOE, Morgantown Energy Technology Center, gives notice of its plans to award a ten month cost-shared Grant to the Electric Power Research Institute, Palo Alto, California, in the amount of $233,000.

FOR FURTHER INFORMATON CONTACT: Thomas L. Martin, U.S. Department of Energy, Morgantown Energy Technology Center, P.O. Box 880, Morgantown, WV 26507-0880, Telephone: (304) 291-4087, Grant No.: DE-FG21-91MC27400.

SUPPLEMENTARY INFORMATION: The DOE will fund approximately 43 percent of the allowable costs of the Grant. The pending award is based on an application for a research project entitled, "Technical & Economic Assessment of MCFC Manufacturing Concepts" which was submitted by the Electric Power Research Institute. The general objective of the research project is to conduct technical and economic assessments of proposed methods of component manufacturing to be performed under the three major DOE contracts in the Molten Carbonate Fuel Cell program.

Issued: April 19, 1991.

Louie L. Calaway,

Director, Acquisition and Assistance Division, Morgantown Energy Technology Center.

[FR Doc. 91-9794 Filed 4-24-91; 8:45 am]

BILLING CODE 6450-01-M

Secretary of Energy Advisory Board; Task Force on Civilian Radioactive Waste Management; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770, as amended), notice is hereby given of the following advisory committee task force meeting:

Name: Secretary of Energy Advisory Board Task Force on Civilian Radioactive Waste Management

Date and Time: Tuesday, May 14, 1991, 8:30 a.m.—5 p.m.

Place: Room 1E-245, Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, Telephone: (202) 586-7092.

Contact: Dr. Daniel S. Metlay, Designated Federal Officer, 1000 Independence Avenue, SW, Washington, DC 20585, Telephone: (202) 586-3903.

Purpose: The Task Force will analyze the institutional framework for managing radioactive waste in a manner than ensures public trust and confidence and recommend to the Secretary approaches for establishing public trustworthiness so as to facilitate progress toward the Department's satisfaction of its statutory obligations to establish a repository for civilain radioactive waste.

Tentative Agenda

Tuesday, May 14, 1991

8:30-8:40 a.m. Welcome and opening comments by Todd La Porte, Chair.
8:40-9:30 Remarks from Secretary of Energy James D. Watkins.
9:30-9:40 Remarks from Robert M. Simon, Executive Director, SEAB.
9:40-10:45 Task Force Discussion of Study Plan.
10:45-11 Break.
11-12:30 p.m. Briefings:* The Civilian Radioactive Waste Management Program, Representative from the Office of Civilian Radioactive Waste Management; The Role of the Nuclear Regulatory Commission in Regulating High Level Radioactive Waste, Robert Bernero, Director, Office of Nuclear materials Safety and Safeguards, USNRC; The Role of the Nuclear Waste Technical Review Board, Representative from the Nuclear Waste Technical Review Board (Invited); The Role of the Nuclear Waste Negotiator, David Leroy, Nuclear Waste Negotiator (Invited): Public Trust and Confidence: A Perspective from the Utility Industry, Loring Mills, Vice President for Nuclear Affairs, Edison Electric Institute; Public Trust and Confidence: A Perspective from the Environmental Community, Dan Reicher, Senior Attorney, Natural Resources Defense Council (Invited).
12:30-1:30 Lunch.
1:30-3 Briefings (Continued).
3:00-3:15 Break.
3:15-4:30 Task Force Discussion.
4:30-5 Public Comments.

Public Participation: The meeting is open to the public. The Chairman of the task force is empowered to conduct the meeting in a fashion that will, in the Chairman's judgment, facilitate the orderely conduct of business.

Persons wishing to attend the public meeting should call (202) 586-7092 by May 9 to arrange for visitor passes to the Forrestal Building.

Any member of the public who wishes to make an oral statement pertaining to agenda items should contact the Designated Federal Officer at the address or telephone number listed above. Requests must be received before 3 pm (e.s.t.) Friday, May 10, 1991, and reasonable provision will be made to include the presentation during the public comment period. It is requested that oral presenters provide 15 copies of their statements at the time of their presentations.

Written testimony pertaining to agenda items may be submitted prior to the meeting. Written testimony must be received by the Designated Federal Officer at the address shown above before 5 pm (e.s.t.) Friday, May 10, 1991, to asure it is considered by Task Force members during the meeting.

Minutes: A transcript of the open, public meeting will be available for public review and copying approximately 30 days following the meeting at the Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue SW., Washington, Dc, between 9 a.m. and 4 p.m., Monday through Friday except Federal holidays.

Issued: Washington, DC, on: April 22, 1991.

J. Robert Franklin,

Deputy Advisory Committee Management Officer.

[FR Doc. 91-9796 Filed 4-24-91; 8:45 am]

BILLING CODE 6450-01-M

* Order of appearance is still being finalized.

Office of Fossil Energy

[FE Docket No. 91-22-NG]

Bonus Gas Processors, Inc.; Application for Blanket Authorization To Import and To Export Natural Gas

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of application for blanket authorization to import and to export natural gas.

SUMMARY: The Office of Fossil Energy of the Department of Energy (DOE) gives notice of receipt on March 20, 1991, of an application filed by Bonus Gas Processors, Inc. (Bonus), for blanket authorization to import and export a combined total of up to 110 Bcf of natural gas, including liquefied natural gas (LNG), over a two-year period commencing with the date of first import or export after May 24, 1991, the date Bonus' existing blanket import authority expires (1 ERA 70,799). Although Bonus is primarily interested in importing and exporting natural gas from and to Canada, it also seeks authority to import and export natural gas from and to any country with which trade in natural gas has not been prohibited. Bonus would import and export the natural gas for its own accounts and as an agent for the

account of others for sale on the spot market. Bonus would use existing facilities in transporting the proposed import and export of natural gas.

The application is filed under section 3 of the Natural Gas Act and DOE Delegation Order Nos. 0204–111 and 0204–127. Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures and written comments are to be filed at the address listed below no later than 4:30 p.m., e.d.t., May 28, 1991.

ADDRESSES: Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, room 3F–056, FE–50, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Stanley C. Vass, Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, room 3F–056, 1000 Independence Avenue, SW., Washington, DC 20585, (301) 353–3168

Diane Stubbs, Office of Assistant General Counsel for Fossil Energy, U.S. Department of Energy, Forrestal Building, room 6E–042, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–0503

SUPPLEMENTARY INFORMATION: Bonus is a Nevada corporation with its principal place of business in Calgary, Canada, and a wholly owned subsidiary of Bonus Petroleum Corporation. Under the proposed arrangement, Bonus asserts that the purchase price of the gas, which it would obtain from various producers, would be determined by competitive factors in the gas markets and through arms length negotiations. Bonus further asserts that all sales would be made under contracts with terms of two years or less and that Bonus will submit quarterly reports detailing each transaction, including in the case of LNG sales, copies of all agreements together with identification of the country of origin or consumption.

In support of its application, Bonus states that the fact that the gas to be bought and sold under the authorization requested may be imported or exported removes artificial trade barriers and assures that the most competitively priced gas, foreign or domestic, reaches the North American gas market. Further, by authorizing the export of domestically produced gas, Bonus contends that surpluses of gas in some regions of the U.S. will be reduced, along with the U.S. trade deficit.

Bonus further states that its existing blanket import authorization expires May 24, 1991. Accordingly, Bonus requests expeditious action on its application so that ongoing imports of gas will not be disrupted.

This application will be reviewed under section 3 of the Natural Gas Act and the authority contained in DOE Delegation Order Nos. 0204–111 and 0204–127. In reviewing a natural gas import application, the competitiveness of an import in the market served is the primary consideration in determining whether the proposed import arrangement meets the public interest requirements of section 3 of the NGA. In reviewing a natural gas export application, the domestic need for the gas to be exported is considered, and any other issues determined to be appropriate in a particular case, including whether the arrangement is consistent with DOE policy of promoting competition in the natural gas marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this application should comment in their responses on these matters as they may relate to the requested import or export authority. The applicant asserts that the import and export authority requested would be in the public interest because it would facilitate short-term and spot market transactions and promote competition in the gas marketplace. Parties opposing the arrangement bear the burden of overcoming these assertions.

NEPA Compliance

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires the DOE to give appropriate consideration to the environmental effects of its proposed actions. No final decision will be issued in this proceeding until the DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have the written comments considered as the basis for any decision on the application must, however, file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to this application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Fuels Programs at the above address.

It is intended that a decisional record will be developed on the application through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, a notice will be provided to all parties. If no party requests additional procedures, a final opinion and order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

A copy of Bonus' application is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F–056, at the above address, (202) 586–9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, April 16, 1991.

Anthony J. Como,

Director, Office of Coal and Electricity, Office of Fossil Energy.

[FR Doc. 91–9795 Filed 4–25–91; 8:45 am]

BILLING CODE 6450–01–M

Energy Information Adminstration

Agency Information Collections Under Review by the Office of Management and Budget

AGENCY: Energy Information Administration, DOE.

ACTION: Notice of requests submitted for review by the Office of Management and Budget.

SUMMARY: The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (Pub. L. No. 96–511, 44 U.S.C. 3501 et seq.). The listing does not include collections of information contained in new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (the DOE component or Federal Energy Regulatory Commisson (FERC)); (2) Collection number(s); (3) Current OMB docket number (if applicable); (4) Collection title; (5) Type of request, e.g., new, revision, extension, or reinstatement; (6) Frequency of collection; (7) Response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) Affected public; (9) An estimate of the number of respondents per report period; (10) An estimate of the number of responses per respondent annually; (11) An estimate of the average hours per response; (12) The estimated total annual respondent burden; and (13) A brief abstract describing the proposed collection and the respondents.

DATES: Comments must be filed on or before May 28, 1991. If you anticipate that you will be submitting comments but find it difficult to do so within the time allowed by this notice, you should advise the OMB DOE Desk Officer listed below of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395–3084. (Also, please notify the EIA contact listed below.)

ADDRESSES: Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards at the address below.)

FOR FURTHER INFORMATION AND COPIES OF RELEVANT MATERIALS CONTACT: Jay Casselberry, Office of Statistical Standards, (EI–73), Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Mr. Casselberry may be telephoned at (202) 586–2171.

SUPPLEMENTARY INFORMATION: The energy information collection submitted to OMB for review was:

1. Federal Energy Regulatory Commission
2. FERC–588
3. 1902–0144
4. Emergency Natural Gas Sale, Transportation, and Exchange Transactions
5. Extension
6. On occasion
7. Mandatory
8. Business or other for-profit
9. 55 respondents
10. 1 response
11. 10.0 hours per response
12. 550 hours
13. This requested data is used by the Commission to determine that such emergency transactions qualify for exemption under Part 284, Subpart I of the Commission's Regulations.

Statutory Authority: Sec. 5(a), 5(b), 13(b), and 52, Pub. L. No. 93–275, Federal Energy Administration Act of 1974, 15 U.S.C. 764(a), 764(b), 772(b), and 790a.

Issued in Washington, DC, April 19, 1991.

Yvonne M. Bishop,

Director, Statistical Standards Energy Information Administration.

[FR Doc. 91–9793 Filed 4–24–91; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket Nos. ER91–209–000, et al.]

Northeast Utilities Service Co., et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

April 18, 1991.

Take notice that the following filings have been made with the Commission:

1. Northeast Utilities Service Company

[Docket No. ER91–209–000]

Take notice that on April 15, 1991, Northeast Utilities Service Company (NUSCO), on behalf of the Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company, and Holyoke Power and Electric Company, filed supplemental information in this docket explaining and clarifying the rate schedule filed in this docket for comprehensive transmission and distribution service to Connecticut Municipal Electric Energy Cooperative (CMEEC).

NUSCO states that copies of this information have been mailed to CMEEC and to state utility regulators in Connecticut.

NUSCO renews its request that the Commission waive its standard notice periods and filing regulations to the extent necessary to permit the rate schedule to become effective January 1, 1991. CMEEC emphasized its desire that the Commission grant the January 1, 1991 effective date.

Comment date: May 2, 1991, in accordance with Standard Paragraph E at the end of this notice.

2. Encogen Northwest, L.P.

[Docket No. QF91–111–000]

On April 11, 1991, Encogen Northwest, L.P. of 10375 Richmond Avenue, Houston, Texas 77042, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's Regulations. No determination has been made that the submittal constitutes a complete filing.

The facility will be located at the site of the Georgia-Pacific Corporation pulp and paper mill and chemical plant in Bellingham, Washington, and will consist of three combustion turbine generators, an unfired heat recovery boiler (HRB) and an extraction/condensing steam turbine generator (STG). Steam recovered from the STG will be used in processing of pulp, paper and chemical. The net electric power production capacity of the facility will be 162 MW. The primary energy source will be natural gas. Installation of the facility is expected to commence in August 1991.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

3. Central Vermont Public Service Corporation

[Docket No. ER91–117–000]

Take notice that Central Vermont Public Service Corporation (CVPS) on April 15, 1991, tendered for filing supplemental information and a notice of termination in the above docket.

CVPS requests the Commission to waive its notice of filing requirements to permit the rate schedules that were filed in this docket to become effective as of November 1, 1989.

Comment date: May 2, 1991 in accordance with Standard Paragraph E at the end of this notice.

4. American Municipal Power-Ohio, Inc. v. Dayton Power and Light Company

[Docket No. EL91-27-000]

Take notice that on April 10, 1991, American Municipal Power-Ohio, Inc. (AMP-Ohio) tendered for filing a complaint against Dayton Power and Light Company (DP&L). In its complaint AMP-Ohio requests that the Commission decide under which of two agreements DP&L can collect charges for the short-term transmission service DP&L provided to AMP-Ohio in April and May of 1989 through 1990. AMP-Ohio further states that DP&L charged under both agreements for the same service, AMP-Ohio requests that the Commission order DP&L to refund to AMP-Ohio, or its members as appropriate, all charges collected for short-term transmission during the period in excess of the legal amount, with interest.

Comment date: May 20, 1991, in accordance with Standard Paragraph E at the end of this notice.

5. Central Vermont Public Service Corporation

[Docket No. ER91-283-000]

Take notice that on April 12, 1991, Central Vermont Public Service Corporation (CVPS) tendered for filing notice that the sale by Unitil Power Corp. to CVPS of 10 MW of the New Haven Harbor Station for May 1, 1991 to October 31, 1991 is not operative in the aforementioned docket.

CVPS requests the Commission to waive its notice of filing requirements to permit the rate schedule that was filed in this docket to become effective May 1, 1991.

Comment date: May 2, 1991, in accordance with Standard Paragraph E at the end of this notice.

6. Wisconsin Electric Power Company

[Docket No. ER91-200-000]

Take notice that Wisconsin Electric Power Company (Wisconsin Electric) on April 15, 1991, tendered for filing the additional cost support information requested by staff, concerning its original submittal in Docket No. ER91-200-000. Wisconsin Electric renews its request of an effective date of September 1, 1990.

Copies of the filing have been served on WPPI, the City of Menasha and the Public Service Commission of Wisconsin.

Comment date: May 2, 1991, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-9706 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP91-1799-000, et al.]

Sea Robin Pipeline Co., et al.; Natural Gas Certificate Filings

April 18, 1991.

Take notice that the following filings have been made with the Commission:

1. Sea Robin Pipeline Company

[Docket No. CP91-1799-000]

Take notice that on April 11, 1991, Sea Robin Pipeline Company (Sea Robin) Post Office Box 2563, Birmingham, Alabama 35202 filed in Docket No. CP91-1799-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon a transportation service for Columbia Gas Transmission Corporation (Columbia), all as more fully set forth in the application on file with the Commission and open to public inspection.

Sea Robin states that it proposes to abandon the transportation service performed for Columbia pursuant to Sea Robin's Rate Schedule X-33. Sea Robin also states that under the terms of this rate schedule Sea Robin has transported up to 500 Mcf per day on a firm basis for Columbia. The agreement under which this transportation service is performed has been terminated by Columbia effective February 6, 1991. No facilities will be abandoned in connection with the abandonment of the transportation services.

Comment date: May 9, 1991, in accordance with Standard Paragraph F at the end of this notice.

2. Transcontinental Gas Pipe Line Corporation

[Docket No. CP91-569-001]

Take notice that on March 18, 1991, Transcontinental Gas Pipe Line Corporation (Transco), Post Office Box 1396, Houston, Texas 77251, filed in Docket No. CP91-569-001, an amendment to the application pending in Docket No. CP91-569-000, pursuant to section 7(c) of the Natural Gas Act, requesting that the Commission confirm in this proceeding, that Transco would be permitted to roll-in the costs of the facilities associated with the extension of its Southeast Louisiana Lateral, Offshore Louisiana, into it's systemwide IT and FT rates in its next Natural Gas Act (NGA) section 4 general rate case, all as more fully set forth in the amendment which is on file with the Commission and open to public inspection.

Transco states that in its original filing in Docket No. CP91-569-000, Transco stated that it intended to include the costs associated with the construction and operation of its Southeast Louisiana project in the design of its rolled-in systemwide IT and FT rates in its next NGA section 4 general rate case filing following Commission approval of the instant application. Transco further states that certain parties in their protests to Docket No. CP91-569-000 raised concerns regarding Transco's intention to roll-in the costs of the facilities in its next rate case.

In its amended filing in Docket No. CP91-569-001, Transco states that it is unwilling to accept the financial exposure of proceeding with construction of the proposed facilities unless it receives a determination from the Commission that the facilities would be entitled to rolled-in treatment when Transco files to include the costs of the facilities in its next rate case. Therefore, Transco requests that the Commission make such a determination in this proceeding rather than deferring the issue to Transco's next rate case.

Comment date: May 9, 1991, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

3. Williams Natural Gas Company

[Docket No. CP91-1801-000]

Take notice that on April 11, 1991, Williams Natural Gas Company (WNG), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP91-1801-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to construct and operate

measuring, regulating and appurtenant facilities and to construct for and convey to the City of Gardner, Kansas (Gardner) approximately 1.2 miles of 6-inch lateral pipeline for the delivery of transportation gas to Gardner, under the blanket certificate issued in Docket No. CP82-479-000, and pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Pursuant to an executed Facility Construction, Ownership & Operating Agreement (C&O Agreement) between WNG and Gardner, WNG states that it will construct all of the facilities necessary for the delivery. WNG states that it will retain ownership of the measuring, regulating and appurtenant facilities and Gardner will assume ownership of the pipeline upon completion of construction. It is stated that the cost of the facilities is estimated to be $233,653 which will be fully reimbursed by Gardner.

WNG proposes to tap its Hugoton-Kansas 26-inch pipeline in the SE/4 section 29, T14S-R23E, Johnson County, Kansas and construct the above described facilities for the delivery of transportation gas to the Gardner turbine power plant. It is stated that the projected volume of delivery through these facilities is estimated to be 104,284 Mcf per year with a maximum peak load of 2,086 Mcf per day. Since the gas will be used to operate peaking turbines, WNG states that usage will occur primarily during June, July, August and September and will have little or no impact during WNG's peak day or annual deliveries.

It is stated that the construction of the 1.2 miles of 6-inch pipeline will necessitate crossing Interstate 35, 175th Street in Gardner and a tributary of Little Bull Creek. WNG avers that the creek is less than 10 feet wide and the crossing is authorized by nationwide permit pursuant to 33 CFR 330.5(a)(12). WNG states that it will adhere to the Special Conditions set out in § 330.5(b) and the Management Practices set out in § 330.6 of the nationwide permit. In addition, it is stated that WNG will abide by Staff's Stream and Wetland Construction and Mitigation Procedures when crossing the tributary. Further, WNG submits that copies of clearances from the Kansas Department of Wildlife and Parks, the Kansas State Historical Preservation Officer and the State of Kansas Department of Health and Environment are attached to its request. WNG states that it has requested but not yet received clearance from the U.S. Fish & Wildlife Service. It is stated that also attached to its request is a copy of the Stream and Wetland Construction and Mitigation Procedures and the Erosion Control, Revegetation and Maintenance Plan WNG will utilize during construction.

WNG states that this chance is not prohibited by existing tariff and it has sufficient capacity to accomplish the deliveries specified without detriment or disadvantage to its other customers.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

4. Columbia Gulf Transmission Company, Columbia Gulf Transmission Company

[Docket Nos. CP91-1819-000 [1], CP91-1820-000]

Take notice that on April 12, 1991, Columbia Gulf Transmission Company (Columbia Gulf), P.O. Box 1273, Charleston, West Virginia, 25325-1273, filed in the above referenced dockets, prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to transport natural gas on behalf of various shippers under its blanket certificates issued in Docket No. CP86-239-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the prior notice requests which are on file with the Commission and open to public inspection and in the attached appendix.

Information applicable to each transaction including the identity of the shipper, the date of the transportation service agreement between Columbia Gulf and the respective shipper, the reference number of the transportation service agreement, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day, and annual volumes, and the docket number and initiation dates of the 120-day transactions under § 284.223 of the Commission's Regulations has been provided by the Applicants and is included in the attached appendix.

Columbia Gulf alleges that it would provide the proposed service for each shipper under an executed transportation service agreement and would charge rates and abide by the terms and conditions of the referenced transportation rate schedules.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

[1] These prior notice requests are not consolidated.

Docket No. trans. agree. (ref. No.)	Applicant	Shipper name	Peak day, [1] average, annual	Points of		Start up date, rate schedule, service type	Related [2] dockets
				Receipt	Delivery		
CP91-1819-000 3-1-91 (0479K)	Columbia Gulf	Citizens Gas Supply Corp.	40,000 25,000 9,125,000	Off. LA	LA	3-1-91, ITS-2, Interruptible	CP86-239-000, ST91-7880-000
CP91-1820-000 2-28-91 (0599B)	Columbia Gulf	Unocal Exploration Corp.	30,000 10,000 3,650,000	Off. LA	Off. LA	2-28-91, ITS-2, Interruptible	CP86-239-000, ST91-7859-000

[1] Quantities are shown in MMBtu.
[2] The ST docket indicates that 120-day transportation service was initiated under § 284.223(a) of the Commission's Regulations.

5. Northern Natural Gas Company

[Docket No. CP91-1824-000]

Take notice that on April 15, 1991, Northern Natural Gas Company (Northern), 2223 Dodge Street, Omaha, Nebraska 68102, filed in Docket No. CP91-1824-000 a request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations for authorization to upgrade a delivery point to accommodate increased natural gas deliveries to Northwestern Public Service (NWPS), an existing local distribution customer, under Northern's blanket certificate issued in Docket No.

CP82-401-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Northern proposes to upgrade the delivery point to NWPS located in Beadle County, South Dakota in order to accommodate increased natural gas sales to NWPS under Northern's Rate Schedule CD-1. It is stated that NWPS would purchase these additional volumes for resale to the Huron Gas Turbine Plant located in the vicinity of Huron, South Dakota. It is further stated that the additional volumes are necessary because of the construction of a new combustion turbine generator at the Huron Gas Turbine Plant.

Northern states that the current peak day and annual volumes delivered at the subject delivery point are 1,524 Mcf and 14,995 Mcf, respectively. It is estimated that the proposed increased peak day and annual volumes delivered at this point would be 2,464 Mcf and 39,424 Mcf, respectively. Northern states that the estimated total volumes delivered to NWPS after the proposed upgrade would be within the currently effective entitlement for NWPS as set forth in the service agreement dated October 26, 1988.

Northern states that the proposal is not prohibited by its existing FERC Gas Tariff and that it has sufficient capacity to accomplish the changes proposed herein without detriment or disadvantage to its other customers. Northern estimates that the proposed upgrade would cost $50,000, part of which would be reimbursed by NWPS.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

6. Columbia Gas Transmission Corporation

[Docket Nos. CP91-1839-000, CP91-1840-000, CP91-1841-000]

Take notice that Columbia Gas Transmission Corporation, 1700 MacCorkle Avenue, SE., Charleston, West Virginia 25314, (Applicant) filed in the above-referenced dockets proir notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under its blanket certificate issued in Docket No. CP86-240-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[2]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under §284.223 of the Commission's Regulations, has been provided by Applicant and is summarized in the attached appendix.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

[2] These prior notice requests are not consolidated.

Docket No. (date filed)	Shipper name (type)	Peak day, average day, annual MMBtu	Receipt points [1]	Delivery points	Contract date, rate schedule, service type	Related docket, start up date
CP91-1839-000 (4-15-91)	Krupp & Associates (Marketer).	30,000 24,000 10,950,000	OH, MD, PA, NY, VA, KY, WV.	OH, MD, PA, NY, VA, KY, WV.	2-5-91, ITS, Interruptible.	ST91-7660, 3-10-91.
CP91-1840-000 (4-15-91)	Cumberland Gas Marketing Co. (Marketer).	25,000 20,000 9,125,000	OH	OH, MD, PA, NY, VA, KY, WV.	2-18-91, ITS, Interruptible.	ST91-7703, 2-21-91.
CP91-1841-000 (4-15-91)	Gas Access Systems, (Marketer).	200,000 160,000 73,000,000	Various	OH, WV	2-22-91, ITS, Interruptible.	ST91-7704, 3-2-91.

[1] Offshore Louisiana and offshore Texas are shown as OLA and OTX.

7. United Gas Pipe Line Company

[Docket No. CP91-1825-000]

Take notice that on April 15, 1991, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP91-1825-000 a request pursuant to §§ 157.205 and 157.211(b) of the Commission's Regulations under the Natural Gas Act for authorization to replace a one-inch tap with a two-inch tap located in Calcasieu Parish, Louisiana, under its blanket certificate issued in Docket No. CP82-430-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

United states that the new tap is for operational purposes only to eliminate problems encountered during annual pig runs in Calcasieu Parish, Louisiana. under United's Rate Schedule DG-N. United further states that it has sufficient capacity to render the proposed service without detriment or disadvantage to its other existing customers.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

8. National Fuel Gas Supply Corporation

[Docket Nos. CP91-1829-000, CP91-1830-000, CP91-1831-000, CP91-1832-000, CP91-1833-000]

Take notice that National Fuel Gas Supply Corporation, 10 Lafayette Square, Buffalo, New York 14203 (Applicant), filed in the above-referenced dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under its blanket certificate issued in Docket No. CP89-1582-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[3]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicant and is summarized in the attached appendix.

[3] These prior notice requests are not consolidated.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

Docket No. (date filed)	Shipper name (type)	Peak day, average day, annual MMBtu	Receipt [1] points	Delivery points	Contract date, rate schedule, service type	Related docket, start up date
CP91-,1629-000 (4/15/91)	Sinclair & Valentine	577 577 210,605	OH, PA, NY	OH, PA, NY	12/27/90, IT, Interruptible.	ST91-7930-000, 3/1/91.
CP91-1830-000 (4/15/91)	Goetz Energy Corporation.	10,000 10,000 3,650,000	OH, PA, NY	OH, PA, NY	2/1/91, IT-1, Interruptible.	ST91-7486-000, 2/1/91.
CP91-1831-000 (4/15/91)	Indeck-Yerkes Limited Partnership.	12,848 12,848 4,689,520	OH, PA, NY	OH, PA, NY	12/26/90, IT, Interruptible.	ST91-7331-000, 2/1/91.
CP91-1832-000 (4/15/91)	Industrial Energy Services Company.	5,313 5,313 1,939,245	OH, PA, NY	OH, PA, NY	12/28/90, IT-1, Interruptible.	ST91-7442-000, 2/2/91.
CP91-1833-000 (4/15/91)	Bishop Pipeline	10,000 10,000 3,650,000	OH, PA, NY	OH, PA, NY	12/28/90, IT, Interruptible.	ST91-7284-000, 2/2/91.

[1] Offshore Louisiana and offshore Texas are shown as OLA and OTX.

9. Algonquin Gas Transmission Company

[Docket Nos. CP91-1705-000, CP91-1706-000, CP91-1707-000]

Take notice that on April 3, 1991, as supplemented on April 17, 1991, Algonquin Gas Transmission Company (Applicant), 1284 Soldiers Field Road, Boston, Massachusetts 02135, filed in the respective dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under its blanket certificate issued in Docket No. CP89-948-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the prior notice requests which are on file with the Commission and open to public inspection.[4]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by the Applicant and is summarized in the attached appendix.

Applicant states that each of the proposed services would be provided under an executed transportation agreement, and that Applicant would charge the rates and abide by the terms and conditions of the referenced transportation rate schedules.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

[4] These prior notice requests are not consolidated.

Docket No. (date filed)	Shipper name	Peak day,[1] average, annual	Points of		Start up date, rate schedule	Related [2] dockets
			Receipt	Delivery		
CP91-1705-000 4-03-91	Paragon Gas Corporation	120,000 120,000 43,800,000	NJ, NY, CT, MA	MA, RI, NY, CT, NJ	2-02-91, 4-12-90, AIT-1	ST91-7644-000, ST91-7904-000.
CP91-1706-000 4-03-91	O & R, Inc.	50,000 40,000 18,250,000	NJ, NY	MA, RI, NY, NJ, CT	1-16-91, 2-12-91, 2-12-91, 2-12-91, 3-01-91, AIT-1	ST91-7649-000, ST91-7645-000, ST91-7652-000, ST91-7653-000, ST91-7909-000.
CP91-1707-000 4-03-91	NGC Transportation, Inc.	200,000 200,000 73,000,000	NJ	NJ, MA	1-08-91, AIT-1	ST91-6796-000.

[1] Quantities are shown in MMBtu unless otherwise indicated.
[2] The CP docket corresponds to applicant's blanket transportation certificate. If an ST docket is shown, 120-day transportation service was reported in it.

10. Kentucky West Virginia Gas Company, Colorado Interstate Gas Company, Colorado Interstate Gas Company

[Docket Nos. CP91-1821-000,[5] CP91-1822-000, CP91-1823-000]

Take notice that on April 15, 1991, Applicants filed in the above referenced dockets, prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to transport natural gas on behalf of various shippers under their respective blanket certificates issued pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the prior notice requests which are on file with the Commission and open to public inspection and in the attached appendix.

Information applicable to each transaction including the identity of the shipper, the date of the transportation service agreement between the Applicant and the respective shipper, if applicable, the reference number of the transportation service agreement, the

[5] These prior notice requests are not consolidated.

type of transportation service, the appropriate transportation rate schedule, the peak day, average day, and annual volumes, and the docket number and initiation dates of the 120-day transactions udner § 284.223 of the Commission's Regulations has been provided by the Applicants and is included in the attached appendix.

The Applicants allege that it would provide the proposed service for each shipper under an executed transportation service agreement and would charge rates and abide by the terms and conditions of the referenced transportation rate schedules.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

Docket No. trans. agree. (ref. no.)	Applicant	Shipper name	Peak day [1] average, annual	Points of		Start up date, rate schedule, service type	Related [2] dockets
				Receipt	Delivery		
CP91-1821-000 1-1-90	Kentucky West Virginia Co., 3500 Park Ln., Pittsburgh, PA 15275.	Southeastern Gas Company.	1,000 Dth 490 Dth 635,000 Dth	KY	KY	2-15-91, IGTS, Interruptible.	CP86-527-000, ST91-6689-000.
CP91-1821-000 12-31-90	Kentucky West Virginia Co.	Interstate Natural Gas Company.	1,000 Dth 595 Dth 365,000 Dth	KY	KY	2-15-91, IGTS, Interruptible.	CP86-527-000, ST91-6775-000.
CP91-1822-000 1-1-91 (13171)	Colorado Interstate Gas Co., P.O. Box 1087, Colorado Springs, CO 80944.	Associated Intrastate Pipeline Company.	10,000 5,000 1,825,000	OK, CO, WY, & KS	WY	1-1-91, TI-1, Interruptible.	CP86-589-000, ST91-6632-000.
CP91-1823-000 2-22-91 (13210)	Colorado Interstate Gas Co.	Rangeline Corporation.	15,000 7,000 2,555,000	WY, KS, & OK	OK	2-22-91, TI-1, Interruptible.	CP86-589-000, ST91-7541000.

[1] Quantities are shown in MMBtu unless otherwise indicated.
[2] The CP Docket number corresponds to the Applicants' blanket transportation certificate. The ST docket indicates that 120-day transportation service was initiated under § 284.223(a) of the Commission's Regulations.

11. National Fuel Gas Supply Corporation

[Docket No. CP91-1834-000, No. CP91-1835-000, No. CP91-1836-000, No. CP91-1837-000, No. CP91-1838-000]

Take notice that on April 15, 1991, National Fuel Gas Supply Corporation (Applicant), 10 Lafayette Square, Buffalo, New York 14203, filed in the the above referenced dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under its blanket certificate issued in Docket No. CP89-1582-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[6]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicant and is summarized in the attached appendix.

Applicant states that each of the proposed services would be provided under an executed transportation agreement, and that Applicant would charge the rates and abide by the terms and conditions of the referenced transportation rate schedules.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

[6] These prior notice requests are not consolidated.

Docket No. (date filed)	Shipper name	Peak day,[1] average day, annual	Receipt points	Delivery points	Start up date, rate schedule, service type	Related docket,[2] contract date
CP91-1834-000 (4-15-91)	Attica Central School District.	156 156 56,940	NY, PA, OH	NY, PA, OH	2-01-91, IT, Interruptible.	ST91-7207-000, 12-27-90.
CP91-1835-000 (4-15-91)	Farrell Area School District.	175 175 63,875	NY, PA, OH	NY, PA, OH	2-01-91, IT, Interruptible.	ST91-7321-000, 1-03-91.
CP91-1836-000 (4-15-91)	Coastal Gas Marketing Co.	200,000 200,000 73,000,000	NY, PA, OH	NY, PA, OH	2-02-91, IT, Interruptible.	ST91-7439-000, 12-28-90.
CP91-1837-000 (4-15-91)	Cranberry Pipeline Corporation.	5,000 5,000 1,825,000	NY, PA, OH	NY, PA, OH	2-01-91, IT, Interruptible.	ST91-7527-000, 1-21-91.
CP91-1838-000 (4-15-91)	Potomac Electric Power Co.	250,000 250,000 91,250,000	NY, PA, OH	NY, PA, OH	2-28-91, IT, Interruptible.	ST91-7299-000, 1-16-91.

[1] Quantities are shown in MMBtu.
[2] If an ST docket is shown, 120-day transportation service was reported in it.

12. United Gas Pipe Line Company

[Docket No. CP91-1812-000]

Take notice that on April 11, 1991, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP91-1812-000, a request pursuant to §§ 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act, to construct and operate a Rockwell 5000 positive meter and related facilities, in Livingston Parish, LA, pursuant to United's blanket certificate issued in Docket No. CP82-430-000, all as more fully set forth in the request on file with the Commission and open to public inspection.

United states that the proposed meter will enable it to supply an estimated average 125 Mcf/d of natural gas for Livingston Gas Utility District's (District) residential customers, under United's G Rate Schedule.

United further states that the estimated cost of the two-inch meter is $32,700 which cost will be reimbursed by the District. The Rockwell meter will not result in an increase in the District's contractual MDQ and that United has sufficient capacity to render the proposed service without detriment or disadvantage to its other customers, it is explained.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

13. United Gas Pipe Line Company

[Docket No. CP91-1811-000]

Take notice that on April 12, 1991, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP91-1811-000, a request pursuant to §§ 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act, to construct and operate a one-inch riser and related facilities, in Shelby County, Texas pursuant to United's blanket certificate issued in Docket No. CP82-430-000, all as more fully set forth in the request on file with the Commission and open to public inspection.

United indicates that the proposed riser and related facilities will enable it to transport an estimated average 250 Mcf/d of natural gas for DeSoto Pipeline Company (DeSoto) to serve East Texas Asphalt Plant under United's ITS Rate Schedule.

United also states that the estimated cost of the proposed facilities is $4,561 which amount DeSoto would reimburse United for all costs incurred. United further states that it has sufficient capacity to render the proposed service without detriment or disadvantage to its other existing customers.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

14. Granite State Gas Transmission, Inc.

[Docket No. CP91-1808-000]

Take notice that on April 12, 1991, Granite State Gas Transmission, Inc. (Granite State), 300 Friberg Parkway, Westboro, Massachusetts 01581, filed in Docket No. CP91-1808-000 a request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act, to add a new delivery point for deliveries of gas to its affiliated distribution company customer, Northern Utilities, Inc. (Northern), under its blanket certificate issued in Docket No. CP82-515-000, all as more fully set forth in the request on file with the Commission and open to public inspection.

Granite State proposes to establish a new delivery point on its property for deliveries to Northern at the intersection of the Granite State pipeline and Moody Street in Saco, Maine to serve a new customer of Northern.

Granite State estimates the new customer's (Sweetser Home for Children) annual consumption at 6,686 Mcf and the maximum daily at 55 Mcf. Further, Granite State indicates that it would maintain ownership of the proposed facility and that the facility would be constructed for its account. However, Northern would reimburse Granite State for all costs of the facility. That cost is estimated to be $27,760.

Comment date: June 3, 1991, in accordance with Standard Paragraph G at the end of this notice.

15. Panhandle Eastern Pipe Line Company

[Docket No. CP91-1828-000]

Take notice that on April 15, 1991, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77001, filed in Docket No. CP91-1828-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon partially sales of natural gas and pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing Panhandle to modify firm sales service to ten sales customers, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Panhandle states that it is requesting partial abandonment of sales services to Central Illinois Public Service Company (CIPS), The Kansas Power and Light Company (KP&L), Kohomo Gas and Fuel Company (KG&F), Missouri Public Service Company (MPS), Ohio Gas Company (OGC), Ohio Valley Gas Corporation (OVC), Southeastern Michigan Gas Company (SMG), Union Electric Company (UE) and United Cities Gas Company (UCG). Panhandle also states that it is requesting an increase in the service level for KG&F and OGC during the November through March period, an increase in the service level for OGC during the month of July, an increase in the service level for SMG during the months of June, July and August and an increase in the service level of UGG during September.

Panhandle requests an effective date of April 1, 1991, which Panhandle states is the date Panhandle and the customer agreed that the interim service agreements and service levels would become effective.

Comment date: May 9, 1991, in accordance with Standard Paragraph F at the end of the notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 91-9710 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP91-98-001]

CNG Transmission Corp.; Proposed Changes in FERC Gas Tariff

April 18, 1991.

Take notice that CNG Transmission Corporation (CNG) on April 12, 1991, pursuant to section 4 of the Natural Gas Act, and in compliance with the Commission's March 29, 1991, order in the above referenced proceeding, submitted the following revised tariff sheet, with a proposed effective date of March 30, 1991:

Second Substitute Second Revised Sheet No. 212

CNG states that the tariff sheet is in response to the March 29, 1991, order that required CNG to refile Sheet No. 212 to correct a Tennessee docket number.

CNG also states that copies of the filing were served upon CNG's sales customers as well as interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 214 and 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.214 and 385.211. All such protests should be filed on or before April 25, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-9715 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP91-26-003]

El Paso Natural Gas Co; Tariff Filing

April 18, 1991.

Take notice that El Paso Natural Gas Company (El Paso) on April 16, 1991, tendered for filing the following tariff sheets to its FERC Gas Tariff, Second Revised Volume No. 1:

1st Revised First Revised Sheet No. 363
1st Revised First Revised Sheet No. 364
1st Revised First Revised Sheet No. 365
1st Revised First Revised Sheet No. 366
1st Revised First Revised Sheet No. 371
1st Revised First Revised Sheet No. 372

El Paso states that the tariff sheets serve to state the proper allocation methodology for the fixed take-or-pay charges approved in Docket No. RP91-26-000.

El Paso states that the proposed tariff sheets provide for the allocation of the fixed take-or-pay charges among individual sales customers or customer groups based on percentages already agreed upon by all of El Paso's customers, except one, in its offer of settlement in Docket No. RP88-44-000, *et al.*

El Paso requests and the Commission grant such waivers of its applicable rules and regulations as may be necessary to permit the tendered tariff sheets to become effective on May 1, 1991.

El Paso states that copies of the filing were served upon all interstate pipeline system sales customers of El Paso and interested state regulatory commission.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 214 and 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.214 and 385.211. All such protests should be filed on or before April 25, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-9711 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. PR91-15-000]

Farmland Industries, Inc., Complainant, Louisiana Intrastate Gas, Corp., Respondent; Complaint and Request for Refund

April 18, 1991.

Take notice that on April 8, 1991, as corrected on April 9, 1991, Farmland Industries, Inc. (Farmland), 3315 North Oak Trafficway, P.O. Box 7305, Kansas City, MO 64116, filed in Docket No. PR 91-15-000, pursuant to rule 206 of the Commission's Rules of Practice and Procedure (18 CFR 385.206) a complaint against Louisiana Intrastate Gas Corporation (LIG). Farmland requests that the Commission order LIG to refund to it, along with applicable interest, all amounts collected by LIG in violation of section 311 of the Natural Gas Policy Act of 1978 (NGPA) and the regulations promulgated thereunder, for the period July 1, 1987 to the present, all as more fully set forth in the complaint which is on file with the Commission and open to public inspection.

Farmland states that it is a regional farm supply cooperative, which operates an anhydrous ammonia fertilizer plant in Pollock, Louisiana. Farmland indicates that, in connection with its manufacturing operations, the Pollock Plant uses large amounts of natural gas some of which is transported by LIG, a Louisiana intrastate pipeline, pursuant to the Commission's jurisdiction. Farmland alleges that LIG's rates, charges, terms and conditions of service were and are unjust and unreasonable, unlawful, unduly discriminatory, and anti-competitive. To the extent that relief is not granted in a summary manner, Farmland respectfully requests that the Commission order a public hearing be held with respect to its complaint in an expedited manner.

Farmland states that it and LIG agreed to a series of contractual modifications and amendments to a Natural Gas Service Agreement (NGS Agreement) including an August 15, 1985 Letter Amendment (Letter Amendment) which, *inter alia*, provided that LIG would provide section 311 transportation to the Pollock Plant as well as intrastate transportation. Farmland states it and LIG entered into a section 311 contract for interruptible

transportation effective July 1, 1987. Farmland alleges that paragraph 6(d) of the Letter Amendment contained minimum take and minimum bill provisions and paragraph 3 of the Letter Amendment required it to pay a demand charge to LIG. Farmlands specific complaints are as follows:

(1) Pursuant to § 284.9(d) of the Commission's regulations, LIG is not entitled to collect a demand charge for interruptible section 311 transportation service.

(2) Pursuant to § 284.9(d) of the Commission's regulations, LIG is not entitled to guaranteed revenue by virtue of any minimum take, minimum bill or other provisions that has the effect of guaranteeing revenue for interruptible section 311 transportation service.

(3) Pursuant to the filed rate doctrine, LIG is not entitled to collect any rate in excess of the rates filed with, and approved by, the Commission.

(4) Because of the operation of paragraph 6(d) of the Letter Amendment, Farmland states that it did not avail itself of section 311 transportation service on the same terms and conditions and at the same rate available to the public generally, but was instead required to skew its purchases toward "intrastate" supplies attached to LIG. Farmland alleges that such purchasing practices resulted in Farmland paying at least $650,000 more for gas delivered to the Pollock Plant than it would have paid in the absence of this provision.

(5) Farmland states that by requiring it to pay a demand charge for a combination of intrastate and section 311 transportation, LIG engaged in a scheme (a) to receive rates for intrastate transportation in excess of those rates permitted by the Commission and (b) to circumvent section 284.9(d) of the Commission's regulation.

Farmland requests that LIG be ordered to refund to Farmland all rates collected by LIG that exceeded the rates and charges authorized by the Commission and all demand charges in violation of § 284.9(d) plus applicable interest as provided in § 284.2(b). Farmland further requests that the demand charges and the minimum bill provisions be stricken from the Letter Amendment and be declared to be of no force and effect. Finally, it requests that LIG be ordered to pay all fees and expenses incurred by it in prosecuting this action.

Any person desiring to be heard or to make any protest with reference to said complaint should on or before May 20, 1991, file with the Federal Energy Regulatory Commission, Washington, DC 209426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing must file a motion to intervene in accordance with the Commission's Rules.

Farmland states a copy of the complaint has been served on LIG. LIG's answer to the complaint shall also be due on or before May 20, 1991.

Lois D. Cashell,

Secretary.

[FR Doc. 91-9707 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP91-138-000]

Florida Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

April 19, 1991.

Take notice that on April 17, 1991, Florida Gas Transmission Company (FGT) filed with the Federal Energy Regulatory Commission the following tariff sheet to its FERC Gas Tariff, Second Revised Volume No. 1 with the proposed effective date of June 1, 1991:

First Revised Sheet No. 240.

FGT states that the purpose of the filing is to revise FGT's procedures for scheduling preferred sales and transportation services. FGT also states that the proposed changes will promote greater allocative efficiency on FGT's system and will provide FGT's preferred customers with information necessary to accurately plan their fuel requirements.

FGT states that copies of the filing have been served on all of FGT's customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before April 26, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 91-9708 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER91-371-000]

Terra Comport Corp.; Filing

April 18, 1991.

Take notice that Terra Comport Corporation (TC) on April 8, 1991, tendered for filing as an initial rate schedule a Capacity and Energy Agreement whereby TC will sell approximately 114 megawatts of capacity and associated energy to Iowa Electric Light and Power Company (IELP) for a 5-year period. TC requests an effective date of January 1, 1990, and requests waiver of the Commission's notice requirement.

Copies of the filing were served upon IELP and upon the Iowa State Utilities Board.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before April 30, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-9712 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-68-030, et al.]

Transcontinental Gas Pipe Line Corp.; Report of Refunds

April 18, 1991.

Take notice that Transcontinental Gas Pipe Line Corporation (Transco) on November 7, 1989, tendered for filing with the Federal Energy Regulatory Commission (Commission) its Report of Refunds, made pursuant to the Commission's September 29, 1989, "Order Approving Settlement As Modified, Issuing Certificates and Granting Petition" in the reference docket. The report summarize refunds amounts made to Transco's customers based on the approved Settlement rate levels. Such refunds cover the period May 1, 1988 through March 31, 1989.

Any person desiring to protest said filings should file a protest with the

Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of Practice and Procedure 18 CFR 385.211. All such protest should be filed on or before May 7, 1991. Protest will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to the proceeding need not file a motion to intervene in this matter. Copies of these filings are on file with the Commission and available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-9714 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP91-54-006]

Trunkline Gas Co.; Proposed Changes in FERC Gas Tariff

April 19, 1991.

Take notice that Trunkline Gas Company (Trunkline) on April 17, 1991, tendered for filing the following substitute revised tariff sheet to its FERC Gas Tariff, Original Volume No. 1:

Substitute Fourth Revised Sheet No. 3-A.5

The subject tariff sheet bears an issue date of April 17, 1991, and a proposed effective date of April 1, 1991.

Trunkline states that this substitute revised tariff sheet is being filed in compliance with the Commission's Order dated January 16, 1991 in the above-referenced proceeding. Specifically, Trunkline's filing reflects an adjustment to the monthly amortized amount for Mississippi River Transmission Corporation which was inadvertently omitted from the March 28, 1991 filing to reflect adjustments related to customers' use of the Optional Deferred Payment Plan.

Trunkline states that a copy of this filing has been sent to all affected sales and transportation customers, affected state commissions and all parties on the service list in the proceedings in Docket No. RP91-54-000.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 214 and 211 of the Commission's Rules of Practice and Procedures, 18 CFR 385.214 and 385.211. All such protests should be filed on or before April 26, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-9709 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER91-318-000]

Wheelabrator South Broward, Inc.; Filing

April 18, 1991.

Take notice that on April 8, 1991, Wheelabrator South Broward, Inc. (South Broward) tendered for filing supplemental information regarding calculation of the capacity rates to be paid by Florida Power & Light Company for the electrical capacity provided by the refuse-to-energy facility owned by South Broward.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before April 26, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

FR Doc. 91-9713 Filed 4-24-91; 8:45 am]

BILLING CODE 6717-01-M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to Office of Management and Budget for Review

April 17, 1991.

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of this submission may be purchased from the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, NW., Washington, DC 20036, (202) 452-1422. For further information on this submission contact Judy Boley, Federal Communications Commission, (202) 632-7513. Persons wishing to comment on this information collection should contact Jonas Neihardt, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503, (202) 395-4814.

OMB Number: 3060-0104.

Title: Temporary Permit to Operate a Part 90 Radio Station.

Form Number: FCC Form 572.

Action: Extension.

Respondents: Individuals or households, state or local governments, non-profit institutions and businesses or other for-profit (including small businesses.)

Frequency of Response: Recordkeeping requirement.

Estimated Annual Burden: 17,023 recordkeepers; .10 hours average burden per recordkeeper; 1,702 hours total annual burden.

Needs and Uses: The FCC Form 572 is used by applicants to have immediate authorization to operate two-way (2-way) radio equipment in Part 90 radio services. Applicants eligible to hold a radio station authorization in the Private Land Mobile Radio Service may use this form as a temporary permit to operate their equipment during processing of an application for license grant.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 91-9734 Filed 4-24-91; 8:45 am]

BILLING CODE 6712-01-M

Public Information Collection Requirement Submitted to Office of Management and Budget for Review

April 17, 1991.

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of this submission may be purchased from the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, NW., Washington, DC 20036, (202) 452-1422. For further information on this submission contact Judy Boley, Federal Communications Commission, (202) 632-7513. Persons wishing to comment on this information collection should contact Jonas

Neihardt, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503, (202) 395–4814.

OMB Number: 3060–0414.
Title: Terrain Shielding Policy.
Action: Extension.
Respondents: Individuals or households, state or local governments, non-profit institutions and businesses or other for-profit (including small businesses).
Frequency of Response: On occasion reporting.
Estimated Annual Burden: 100 responses; 10 hours average burden response; 1,000 hours total annual burden.
Needs and Uses: This policy would require respondents to submit either a detailed terrain study, or assent of all potentially affected parties and graphic depiction of the terrain. The data is used by FCC staff to determine if adequate interference protection can be provided by terrain shielding and if a waiver of 47 CFR 74.705 and 74.707 is warranted.

Federal Communications Commission.
Donna R. Searcy,
Secretary.
[FR Doc. 91–9735 Filed 4–24–91; 8:45 am]
BILLING CODE 6712–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Information Collection Submitted to OMB for Review

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of information collection submitted to OMB for review and approval under the Paperwork Reduction Act of 1980.

SUMMARY: In accordance with requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), the FDIC hereby gives notice that it has submitted to the Office of Management and Budget a request for OMB review of the information collection system described below.

Type of Review: Revision of a currently approved collection.
Title: Asset Marketing Survey—Loans and Real Estate.
Form Number: FDIC 7240/01.
OMB Number: 3064–0089.
Expiration Date of OMB Clearance: January 31, 1993.
Frequency of Response: On occasion.
Respondents: Investors interested in purchasing loans or real estate available for sale by the FDIC.
Number of Respondents: 17,000.
Number of Responses per Respondent: 1.
Total Annual Responses: 17,000.
Average Number of Hours per Response: 0.25.
Total Annual Burden Hours: 4,250.
OMB Reviewer: Gary Waxman, (202) 395–7340, Office of Management and Budget, Paperwork Reduction Project (3064–0089), Washington, DC 20503.
FDIC Contact: Steven F. Hanft, (202) 898–3907, Office of the Executive Secretary, room F–400, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
Comments: Comments on these collections of information are welcome and should be submitted before May 28, 1991.

ADDRESSES: A copy of the submission may be obtained by calling or writing the FDIC contact listed above. Comments regarding the submission should be addressed to both the OMB reviewer and the FDIC contact listed above.

SUPPLEMENTARY INFORMATION: The FDIC is requesting permission to replace a single form, currently used to collect information about investor interest in loans and real estate, with two forms: One for loans and the other for real estate.

Dated: April 19, 1991.
Federal Deposit Insurance Corporation.
Hoyle L. Robinson,
Executive Secretary.
[FR Doc. 91–9716 Filed 4–24–91; 8:45 am]
BILLING CODE 6714–01–M

FEDERAL MARITIME COMMISSION

Port of New Orleans/N.O.M.C., Inc. Terminal; Agreement(s) Filed

The Federal Maritime Commission hereby gives notice that the following agreement(s) has been filed with the Commission pursuant to section 15 of the Shipping Act, 1916, and section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10220. Interested parties may submit protests or comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for comments and protests are found in §§ 560.602 and/or 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Any person filing a comment or protest with the Commission shall, at the same time, deliver a copy of that document to the person filing the agreement at the address shown below.

Agreement No.: 224–003829–004.
Title: Port of New Orleans/N.O.M.C., Inc. Terminal Agreement.
Parties: Port of New Orleans (Port) N.O.M.C., Inc. (NOMC).
Filing party: Mr. Joseph W. Fritz, Jr., Staff Attorney, The Port of New Orleans, P.O. Box 60046, New Orleans, LA 70160.
Synopsis: The Agreement amends the basic agreement to: (1) reflect that Baton Rouge Marine Contractors, Inc. (BRMC) assigned the lease agreement to NOMC, a subsidiary of BRMC; (2) revises the definition of "movement" to allow certain transhipped cargo to be billed as one shipment; and (3) provides an additional berth over which the Port may exercise certain crane operating rights.

By order of the Federal Maritime Commission.
Dated: April 22, 1991.
Joseph C. Polking,
Secretary.
[FR Doc. 91–9733 Filed 4–24–91; 8:45 am]
BILLING CODE 6730–01–M

[Agreement No. 202–003103–101]

Japan-Atlantic and Gulf Freight Conference; Correction

In the Federal Register of April 16, 1991 (56 FR 15372), the title of Agreement No. 202–003103–101 should have read Japan-Atlantic and Gulf Freight Conference instead of the Trans-Pacific Freight Conference of Japan.

By Order of the Federal Martime Commission.
Dated: April 19, 1991.
Ronald D. Murphy,
Assistant Secretary.
[FR Doc. 91–9705 Filed 4–24–91; 8:45 am]
BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Samual Clark Butler, et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are

set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than May 14, 1991.

A. Federal Reserve Bank of Atlanta (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. Samual Clark Butler, Gainesville, Florida; to acquire an additional 2.17 percent of the voting shares of GSB Investments, Inc., Gainesville, Florida, for a total of 15.89 percent, and thereby indirectly acquire Gainesville State Bank, Gainesville, Florida.

B. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Kenneth L. Kellar, Blaine, Washington; to acquire 100 percent of the voting shares of Security State Agency of Aitkin, Inc., Aitkin, Minnesota, and thereby indirectly acquire Security State Bank of Aitkin, Aitkin, Minnesota.

C. Federal Reserve Bank of Kansas City (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Affiliated Bankshares of Colorado, Inc., Employee Incentive Savings and Retirement Plan and Trust, Denver, Colorado; to acquire an additional 9.9 percent of the voting shares of Affiliated Bankshares of Colorado, Inc., Denver, Colorado, for a total of 24.9 percent, and thereby indirectly acquire The Farmers National Bank of Ault, Ault, Colorado; Arapahoe National Bank of Boulder, Boulder, Colorado; First National Bank in Boulder, Boulder, Colorado; First National Bank of Center, Center, Colorado; First Colorado Bank, N.A., Colorado Springs, Colorado; The First National Bank of Colorado Springs, Colorado Springs, Colorado; Moffat County State Bank, Craig, Colorado; Colorado Bank and Trust Company, Delta, Colorado; Denver National Bank, Denver, Colorado; First Colorado Bank and Trust, N.A., Denver, Colorado; The First National Bank of Englewood, Englewood, Colorado; University National Bank of Fort Collins, Fort Collins, Colorado; Fruita State Bank, Fruita, Colorado; Cache National Bank, Greeley, Colorado; First Colorado Bank of Greeley, N.A., Greeley, Colorado; Alameda National Bank, Lakewood, Colorado; First National Bank of Lafayette, Lafayette, Colorado; Littleton National Bank, Littleton, Colorado; First National Bank of Louisville, Louisville, Colorado, First National Bank of Loveland, Loveland, Colorado; Westlake First National Bank, Loveland, Colorado; Bank of Manitou, N.A., Manitou Springs, Colorado; Montrose State Bank, Montrose, Colorado; First Colorado Bank of Pueblo, N.A., Pueblo, Colorado; Chaffee County Bank, N.A., Salida, Colorado; First National Bank, Strasburg, Strasburg, Colorado; First National Bank, Westminster, Westminster, Colorado; and Lakeside National Bank, Denver, Colorado.

2. David C. and Oneida Sue Maysey, Canute, Oklahoma; to acquire an additional 0.77 percent of the voting shares of Canute Bancshares, Inc., Canute, Oklahoma, for a total of 25.99 percent, and thereby indirectly acquire First State Bank, Canute, Oklahoma.

D. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. Dan H. Cook, Wilson, Texas; to acquire 25.12 percent of the voting shares of Wilson Bancshares, Inc., Wilson, Texas, and thereby indirectly acquire Wilson State Bank, Wilson, Texas.

Board of Governors of the Federal Reserve System, April 19, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-9778 Filed 4-24-91; 8:45 am]

BILLING CODE 6210-01-F

Citizens Financial Corporation Employee Stock Ownership Plan; Notice of Application to Engage de novo in Permissible Nonbanking Activities

The company listed in this notice has filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 14, 1991.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Citizens Financial Corporation Employee Stock Ownership Plan, Belzoni, Mississippi; to engage *de novo* in making and servicing loans to Applicant's participants pursuant to § 225.25(b)(1) of the Board's Regulation Y. These activities will be conducted in an area within a 50-mile radius surronding the towns of Belzoni and Yazoo City, Mississippi.

Board of Governors of the Federal Reserve System, April 19, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-9779 Filed 4-24-91; 8:45 am]

BILLING CODE 6210-01-F

Provident Bancorp, Inc., et al.; Acquisitions of Companies Engaged in Permissible Nonbanking Activities

The organizations listed in this notice have applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise

noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than May 14, 1991.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. Provident Bancorp, Inc., Cincinnati, Ohio; to acquire Hunter Savings Association, Cincinnati, Ohio, and thereby engage in operating a savings and loan association pursuant to § 225.25(b)(9) of the Board's Regulation Y.

B. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Swea City Bancorporation, Inc., Swea City, Iowa; to acquire Tietie Insurance Services, Inc., Armstrong, Iowa, and the insurance agency of Swea City State Bank, Swea City, Iowa, and thereby engage in general insurance activities pursuant to § 225.25 (b)(8)(iii) and (b)(8)(vi) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, April 19, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-9760 Filed 4-24-91; 8:45 am]

BILLING CODE 6210-01-F

Star Banc Corporation, et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than May 14, 1991.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. Star Banc Corporation, Cincinnati, Ohio; to merge with Kentucky Bancorporation, Inc., Covington, Kentucky, and thereby indirectly acquire Kentucky National Bank of Ohio, Georgetown, Ohio; Kentucky National Bank of Carroll County, Carrollton, Kentucky; Kentucky National Bank of Kenton County, Covington, Kentucky; Kentucky National Bank of Boone County, Walton, Kentucky; Kentucky National Bank of Pendleton County, Falmouth, Kentucky; and Kentucky National Bank of Marion County, Lebanon, Kentucky.

B. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. LSBancorp, Inc., La Salle, Illinois; to become a bank holding company by acquiring 100 percent of the voting shares of La Salle State Bank, La Salle, Illinois.

C. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Dakota Company, Inc., Minneapolis, Minnesota, and South Dakota Bancorp, Inc., Minneapolis, Minnesota; to acquire South Dakota Financial Bancorporation, Inc., Minneapolis, Minnesota, and to acquire Tri-County State Bank, Chamberlain, South Dakota.

In connection with this application, South Dakota Financial Bancorporation, Inc. has applied to become a bank holding company by acquiring 99.75 percent of the voting shares of Tri-County State Bank, Chamberlain, South Dakota; 87.18 percent of the voting shares of Farmers & Merchants Bank, Huron, South Dakota; 99.44 percent of the voting shares of Dakota State Bank, Milbank, South Dakota; and 100 percent of the voting shares of Marquette Bank, N.A., Sioux Falls, South Dakota.

D. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. Overton Financial Corporation, Overton, Texas; to acquire 80 percent of the voting shares of Lindale Bancshares, Inc., Lindale, Texas, and thereby indirectly acquire Lindale State Bank, Lindale, Texas.

Board of Governors of the Federal Reserve System, April 19, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-9781 Filed 4-24-91; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 91N-0116]

J & R Specialty Supply Co.; Withdrawal of Approval of NADA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of a new animal drug application (NADA) held by J & R Specialty Supply Co. the NADA provides for the use of tylosin-sulfamethazine Type A medicated article to make Type C medicated swine feed. The sponsor requested the withdrawal of approval of the NADA. In a final rule published elsewhere in this issue of the Federal Register, FDA is amending the regulations to reflect the withdrawal of approval.

EFFECTIVE DATE: May 6, 1991.

FOR FURTHER INFORMATION CONTACT: Mohammad I. Sharar, Center for Veterinary Medicine (HFV–216), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4093.

SUPPLEMENTARY INFORMATION: J & R Specialty Supply Co., 310 Second Avenue SW., P.O. Box 506, Waseca, MN 56093, is the sponsor of NADA 138–454 which provides for the use of tylosin-sulfamethazine Type A medicated article to make Type C medicated swine feed. The firm requested withdrawal of approval of the NADA because it no longer manufactures the product.

Therefore, under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Center for Veterinary Medicine (21 CFR 5.84), and in accordance with § 514.115 *Withdrawal of approval of applications* (21 CFR 514.115), notice is given that approval of NADA 138–454 and all supplements and amendments thereto is hereby withdrawn, effective May 6, 1991.

In a final rule published elsewhere in this issue of the **Federal Register**, FDA is amending 21 CFR 510.600(c)(1) and (c)(2), and 558.630(b)(10) to reflect withdrawal of the approval.

Dated: April 18, 1991.

Gerald B. Guest,

Director, Center for Veterinary Medicine.

[FR Doc. 91–9814 Filed 4–24–91; 8:45 am]

BILLING CODE 4160–01–M

[Docket No. 91N–01119]

Chelsea Laboratories, Inc.; Withdrawal of Approval of Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: Food and Drug Administration (FDA) is withdrawing approval of 71 abbreviated new drug applications (ANDA's). Chelsea Laboratories, Inc., 896 Orlando Ave., West Hempstead, NY 11552, notified the agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

EFFECTIVE DATES: May 28, 1991.

FOR FURTHER INFORMATION CONTACT: Lola E. Batson, Center for Drug Evaluation and Research (HFD–360), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–295–8038.

SUPPLEMENTARY INFORMATION: Chelsea Laboratories, Inc., the holder of the ANDA's listed in the table in this document, has informed FDA that these drug products are no longer marketed and has requested that FDA withdraw approval of the applications. The applicant has also, by its request, waived its opportunity for a hearing.

ANDA No.	Drug
62–103	Tetracycline Hydrochloride Capsules, 250 milligrams (mg) and 500 mg.
62–176	Nystatin Tablets, Vaginal, 100,000 units.
62–392	Doxycycline Hyclate Tablets, 50 mg.
71–338	Ibuprofen Tablets, 300 mg.
71–765	Ibuprofen Tablets, 200 mg (yellow round).
71–860	Clorazepate Dipotassium Capsules, 15 mg.
71–878	Clorazepate Dipotassium Capsules, 3.75 mg.
71–879	Clorazepate Dipotassium Capsules, 7.5 mg.
85–138	Diphenhydramine Hydrochloride Capsules, 25 mg.
85–141	Folic Acid Tablets, 1.0 mg.
85–188	Tripelennamine Hydrochloride Tablets, 50 mg.
85–190	Propoxyphene Hydrochloride Capsules, 65 mg.
85–201	Propylthiouracil Tablets, 50 mg.
85–232	Hydrochlorothiazide Tablets, 25 mg.
85–233	Hydrochlorothiazide Tablets, 50 mg (Peach).
85–394	Meclizine Hydrochloride Tablets, 25 mg, Chewable.
85–401	Reserpine Tablets, 0.25 mg.
85–415	Prednisolone Tablets, 5 mg (Green).
85–416	Prednisolone Tablets, 5 mg (White).
85–532	Hydralazine Hydrochloride Tablets, 25 mg.
85–533	Hydralazine Hydrochloride Tablets, 50 mg.
85–684	Promethazine Hydrochloride Tablets, 25 mg.
85–719	Meprobamate Tablets, 600 mg.
85–732	Propoxyphene Hydrochloride with Aspirin and Caffeine Capsules, 65/389/32.4 mg.
85–739	Phentermine Hydrochloride Tablets, 8 mg.
85–741	Diethylpropion Hydrochloride Tablets, 25 mg.
85–764	Butabarbital Sodium Tablets, 15 mg.
85–767	Phendimetrazine Tartrate Tablets, 35 mg (Pink).
85–768	Phendimetrazine Tartrate Tablets, 35 mg (Yellow).
85–770	Phendimetrazine Tartrate Tablets, 35 mg (White).
85–771	Hydralazine Hydrochloride, Hydrochlorothiazide and Reserpine Tablets.
85–772	Butabarbital Sodium Tablets, 30 mg.
85–773	Phedimetrazine Tartrate Tablets, 35 mg (Gray).
85–784	Isoniazid Tablets, 300 mg.
85–790	Isoniazid Tablets, 100 mg.
85–796	Nitrofurantoin Tablets, 100 mg.
85–797	Nitrofurantoin Tablets, 50 mg.
85–818	Dexamethasone Tablets, 0.75 mg.
85–821	Amitriptyline Hydrochloride Tablets, 150 mg.
85–834	Triamcinolone Tablets, 4 mg.
85–839	Bethanechol Chloride Tablets, 25 mg.
85–842	Bethanechol Chloride Tablets, 10 mg.
85–875	Imipramine Hydrochloride Tablets, 10 mg.
85–877	Imipramine Hydrochloride Tablets, 50 mg.
85–878	Imipramine Hydrochloride Tablets, 25 mg.
85–956	Chlorpromazine Hydrochloride Tablets, 25 mg.
85–957	Chlorpromazine Hydrochloride Tablets, 100 mg.
85–958	Chlorpromazine Hydrochloride Tablets, 200 mg.
85–959	Chlorpromazine Hydrochloride Tablets, 10 mg.
85–960	Chlorpromazine Hydrochloride Tablets, 50 mg.
86–071	Isosorbide Dinitrate Tablets, 5.0 mg, Sublingual.
86–072	Isosorbide Dinitrate Tablets, 5.0 mg, Oral.
86–073	Isosorbide Dinitrate Tablets, 2.5 mg, Sublingual.
86–078	Isosorbide Dinitrate Tablets, 10 mg, Oral.
86–087	Hydrochlorothiazide Tablets, 50 mg (Green).
86–159	Methylprednisolone Tablets, 16 mg.
86–330	Hydrochlorothiazide with Reserpine Tablets (25 mg/0.125 mg) (Hydroserpine #1).
86–331	Hydrochlorothiazide with Reserpine Tablets (50 mg/0.125 mg) Hydroserpine #2).
86–458	Trichlormethiazide Tablets, 2 mg.
86–594	Hydrochlorothiazide Tablets, 50 mg (Yellow).
86–728	Hydroxyzine Pamoate Capsules, 100 mg.
86–740	Phentermine Hydrochloride Capsules, 30 mg.
87–002	Hydrochlorothiazide Tablets, 100 mg.
87–469	Isosorbide Dinitrate Tablets, 10 mg Sublingual.
87–490	Isosorbide Dinitrate Tablets, 20 mg Oral.
87–491	Isosorbide Dinitrate Tablets, 30 mg Oral.
87–973	Disulfiram Tablets, 250 mg.
87–974	Disulfiram Tablets, 500 mg.
88–562	Thioridazine Hydrochloride Tablets, 15 mg.
88–681	Allergine (chlorpheniramine maleate) SR Capsules.
88–750	Methyclothiazide Tablets, 2.5 mg.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)) and under authority delegated to the Director of the Center for Drug Evaluation and Research (21 CFR 5.82), approval of the abbreviated new drug applications listed above, and all supplements thereto, is hereby withdrawn, effective May 28, 1991.

Dated: April 17, 1991.

Carl C. Peck,

Director, Center for Drug Evaluation and Research.

[FR Doc. 91–9748 Filed 4–24–91; 8:45 am]

BILLING CODE 4160–01–M

[Docket No. 90N–0185]

Superpharm Corp.; Withdrawal of Approval of Abbreviated New Drug Applications for Diazepam Tablets

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of three abbreviated new drug applications (ANDA's) for diazepam tablets held by Superpharm Corp. (Superpharm), 1769 Fifth Ave., Bayshore, NY 11706. FDA is withdrawing approval of these applications because they contain untrue statements of material

fact, and the drugs covered by these applications lack substantial evidence of effectiveness. Superpharm has withdrawn its request for a hearing on these products.

EFFECTIVE DATE: April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Mary E. Catchings, Center for Drug Evaluation and Research (HFD–366), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–295–8041.

SUPPLEMENTARY INFORMATION: In a notice published in the Federal Register of May 22, 1990 (55 FR 21103), FDA offered an opportunity for a hearing on a proposal to withdraw approval of ANDA's 70–642 (2 milligrams (mg)), 70–643 (5 mg), and 70–644 (10 mg) held by Superpharm. The basis for the proposal was that the applications contain untrue statements of material fact and that the drugs covered by the applications lack substantial evidence of effectiveness. In response to the notice, on June 21, 1990, Superpharm requested a hearing for the products. By letter dated February 21, 1991, Superpharm withdrew its hearing request and consented to the entry of an order withdrawing approval of the applications.

The Director of the Center for Drug Evaluation and Research, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. 355(e)), and under authority delegated to him (21 CFR 5.82), finds that the applications listed above contain untrue statements of material fact (21 U.S.C. 355(e)) and that, on the basis of new information before him with respect to the drugs, evaluated together with the evidence available to him when the applications were approved, there is a lack of substantial evidence that the drugs will have the effects they purport or are represented to have under the conditions of use prescribed, recommended, or suggested in their labeling (21 U.S.C. 355(e)(3)).

Therefore, pursuant to the foregoing finding, approval of ANDA's 70–642, 70–643, and 70–644, and all their amendments and supplements, is hereby withdrawn, effective April 25, 1991. Shipment in interstate commerce of the products listed above will then be unlawful.

Section 505(j)(6)(C) of the act requires that FDA remove from its approved product list (FDA's publication "Approved Drug Products with Therapeutic Equivalence Evaluations") (the list) any drug whose approval was withdrawn for grounds described in the first sentence of section 505(e) of the act. Such grounds apply to the withdrawal of approval of the products listed above. Notice is hereby given that the drugs covered by ANDA's 70–642, 70–643, and 70–644 will be removed from the list.

Dated: April 17, 1991.

Carl C. Peck,

Director, Center for Drug Evaluation and Research.

[FR Doc. 91–9749 Filed 4–24–91; 8:45 am]

BILLING CODE 4160–01–M

[Docket No. 91M–0143]

Optical Radiation Corp.; Premarket Approval of Orcolon®, Intraocular Fluid for Use as a Surgical Aid in Anterior Segment Procedures

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Optical Radiation Corp., Azusa, CA, for premarket approval, under the Medical Device Amendments of 1976, of ORCOLON®, intraocular fluid for use as a surgical aid in anterior segment procedures. After reviewing the recommendation of the Ophthalmic Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant, by letter of March 29, 1991, of the approval of the application.

DATES: Petitions for administrative review by May 28, 1991.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Denis McCarthy, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD 20850, 301–427–1209.

SUPPLEMENTARY INFORMATION: On February 13, 1990, Optical Radiation Corp., Azusa, CA 91702, submitted to CDRH an application for premarket approval of ORCOLON®, intraocular fluid for ophthalmic surgical application. ORCOLON® is intended to be used as a surgical aid in anterior segment surgery including cataract extraction and intraocular lens implantation.

On June 14, 1990, the Ophthalmic Devices Panel, an FDA adisvisory commitee, reviewed and recommended approval of the applicaton. On March 29, 1991, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at CDRH—contact Denis McCarthy (HFZ–460), address above.

Opportunity for Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under part 12 (21 CFR part 12) of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the Federal Register. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before May 28, 1991, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioners of Food and Drugs (21 CFR 5.10) and redelegated to the

Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: April 18, 1991.

Elizabeth D. Jacobson,

Acting Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 91-9815 Filed 4-24-91; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 91M-0142]

Sensormedics Corp.; Premarket Approval of 3100 High Frequency Oscillatory Ventilator

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by SensorMedics Corp., Yorba Linda, CA, for premarket approval, under the Medical Device Amendments of 1976, of the 3100 High Frequency Oscillatory Ventilator. After reviewing the recommendation of the Anesthesiology and Respiratory Therapy Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant by letter of March 29, 1991, of the approval of the application.

DATES: Petitions for administrative review by May 28, 1991.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: James E. Dillard, Center for Devices and Radiological Health (HFZ-430), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD 20850, 301-427-1044.

SUPPLEMENTARY INFORMATION: On February 22, 1990, SensorMedics Corp., Yorba Linda, CA 92687, submitted to CDRH an application for premarket approval of the 3100 High Frequency Oscillatory Ventilator (HFOV). The HFOV is indicated for use in ventilatory support and treatment of respiratory failure and barotrauma in neonates who weigh between 0.54 and 4.6 kilograms and have a gestational age of 24 to 43 weeks.

On June 26, 1990, the Anesthesiology and Respiratory Therapy Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. CDRH concurred with the recommendation of the Anesthesiology and Respiratory Therapy Devices Panel. On March 29, 1991, CDRH approved the application by a letter to the applicant from the director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at CDRH—contact James E. Dillard (HFZ-430), address above.

Opportunity for Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under part 12 (21 CFR part 12) of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register.** If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before May 28, 1991, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: April 18, 1991.

Elizabeth D. Jacobson,

Acting Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 91-9816 Filed 4-24-91; 8:45 am]

BILLING CODE 4160-01-M

National Institutes of Health

National Cancer Institute; Meeting

Notice of Meetings of the National Cancer Advisory Board and its Subcommittees Pursuant to Public Law 92-463, notice is hereby given of the meeting of the National Cancer Advisory Board, National Cancer Institute, and its Subcommittees on May 6 and 7, 1991. The full Board will meet in Conference Room 10, 6th Floor, Building 31C, National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892. Meetings of the Subcommittees of the Board will be held at the times and places listed below. Except as noted below, the meetings of the Board and its Subcommittees will be open to the public to discuss issues relating to committee business as indicated in the notice. Attendance by the public will be limited to space available.

A portion of the Board meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92-463, for the review, discussion and evaluation of individual grant applications. These applications and the disscussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Committee Management Office, National Cancer Institute, National Institutes of Health, Room 10A06, Building 31, 9000 Rockville Pike, Bethesda, Maryland 20892 (301-496-5708) will provide a summary of the meeting and roster of the Board Members, upon request.

Name of Committee: National Cancer Advisory Board.

Executive Secretary: Mrs. Barbara Bynum, Building 31, Room 10A03, Bethesda, MD 20892; (301) 496-5147.

Date of Meeting: May 6 and 7, 1991.

Place of Meeting: Buidling 31C, Conference Room 10.

Open: May 6—8:30 a.m. to recess.

Agenda: Reports on activities of the President's Cancer Panel; the Director's

Report on the National Cancer Institute; and Scientific Presentations.

Closed: May 7—8:30 a.m. to approximately 1:00 p.m.

Agenda: For review and discussion of individual grant applications.

Open: May 7—1:00 p.m. to adjournment.

Agenda: Subcommittee Reports; and New Business.

Name of Committee: Subcommittee on Planning and Budget.

Executive Secretary: Ms. Judith Whalen, Building 31, Room 4A48, Bethesda, MD 20892; (301) 496–5515.

Date of Meeting: May 6, 1991.

Place of Meeting: Building 31C, Conference Room 8.

Open: Immediately following the recess of the NCAB until 6:00 p.m.

Agenda: For Discussion of the FY 1993 by-pass budget.

Name of Committee: Subcommittee on Cancer Centers.

Executive Secretary: Dr. Brian Kimes, Executive Plaza North, Room 300 Bethesda, MD 20892; (301) 496–8537.

Date of Meeting: May 6, 1991.

Place of Meeting: Building 31C, Conference Room 7.

Open: Immediately following the recess of the NCAB meeting until approximately 6 p.m.

Agenda: To discuss the review of ongoing activities and potential new policy initiatives of the Cancer Centers Program.

Name of Committee: AIDS Subcommittee.

Executive Secretary: Dr. Judith Karp, Building 31, Room 4A48 Bethesda, MD 20892; (301) 496–3505.

Date of Meeting: May 6, 1991.

Place of Meeting: Building 31C, Conference Room 8.

Open: 6:00 p.m. until adjournment.

Agenda: The role of Cytokines in AIDS-related Kaposi's Sarcoma-Pathogenesis and future directions for therapy.

Name of Committee: Subcommittee on Minority Health Professional Development.

Executive Secretary: Dr. Vincent Cairoli, Executive Plaza North, Room 232B, Rockville, MD 20892; (301) 496–8530.

Date of Meeting: May 6, 1991.

Place of Meeting: Building 31C, Conference Room 7.

Open: 6 p.m. until adjournment.

Agenda: Minority Training Phase II.

Catalog of Federal Domestic Assistance Program Numbers: (93.393, Cause Cancer and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control.)

Dated: April 17, 1991.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 91–9860 Filed 4–24–91; 8:45 am]

BILLING CODE 4140–01–M

National Institutes of Environmental Health Sciences; Notice of Meeting of Board of Scientific Counselors, NIEHS

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Board of Scientific Counselors, NIEHS, May 6–7, in Building 101 Conference Room, South Campus, NIEHS, Research Triangle Park, North Carolina.

This meeting will be open to the public 9 a.m. to 12 noon on May 6, for the purpose of presenting an overview of the organization and conduct of research in the Laboratory of Molecular Carcinogenesis. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in section 552b(c)(6) of title 5 U.S.Code and section 10(d) of Public Law 92–463, the meeting will be closed to the public on May 6 from approximately 1 p.m. to recess and on May 7 from 9 a.m. to adjournment, for the evaluation of the programs of the Laboratory of Molecular Carcinogenesis, including consideration of personnel qualifications and performance, the competence of individual investigators, and similar items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Executive Secretary, Dr. John McLachlan, Scientific Director, Division of Intramural Research, NIEHS, Research Triangle Park, NC 27709, telephone (919) 541–3205, FTS 629–3205 will furnish summaries of the meeting, rosters of committee members and substantive program information.

Dated: April 16, 1991.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 91–9859 Filed 4–24–91; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF THE INTERIOR

Geological Survey

Advisory Committee on Water Data for Public Use; Meeting

Pursuant to Public Law 92–463, effective January 5, 1973, notice is hereby given that an open meeting of the Advisory Committee on Water Data for Public Use (ACWDPU) will be held May 14–16, 1991, at the Sheraton Airport Hotel, 2525 E. 78th Street, Bloomington, Minnesota 55425. The ACWDPU consists of representatives of water resources-oriented groups, including national, State, and regional organizations, professional and technical societies, and the academic community. Its principal responsibility is to advise the Secretary of the Interior, through the Director of the Geological Survey, on the views of the non-Federal community regarding plans, policies, and procedures related to water-data programs. The Director of the U.S. Geological Survey (USGS) is the Chairman of the Advisory Committee, and the Chief Hydrologist is the Alternate Chairman.

The meeting will convene at 8:30 a.m. on Tuesday, May 14, 1991, and will adjourn at noon on Thursday, May 16, 1991. The theme of the meeting is "Water Resources Information Needs for Wetland and Habitat Management." The proposed agenda for the meeting includes presentations and panel discussions by Federal and State officials on wetlands and habitat management programs, the National Water-Quality Assessment Program, other coordination activities of the Federal Government, and other water-related programs of the U.S. Geological Survey. The meeting will include a tour of the Minnesota River Valley Wildlife Refuge.

The Advisory committee meeting is open to the public, and anyone wishing to attend or desiring additional information should contact Nancy Lopez, Chief, Office of Water Data Coordination, U.S. Geological Survey, 417 National Center, Reston, Virginia 22092. Her telephone number is (703) 648–5014. Proceedings of the meeting will be available on request.

Dated: March 28, 1991.

Bruce Parks,

Acting Chief, Office of Water Data Coordination.

[FR Doc. 91–9766 Filed 4–24–91; 8:45 am]

BILLING CODE 4310–31–M

Bureau of Land Management

[UT–050–01–4410–08]

Advisory Council Meeting and Tour

AGENCY: Bureau of Land Management; Interior.

ACTION: District Advisory Council meeting.

SUMMARY: The Richfield District Advisory Council will hold a meeting on May 22, 1991. The meeting will start at 10 a.m. in the District Office, 150 East 900 North, Richfield, Utah. There will be a field trip to Yuba Reservoir on May 23, 1991. The agenda will be:

1. Election of officers.
2. District drought update.
3. Update on the Henry Mountain Planning.
4. Recreation update.
5. Public land and vandalism.

6. Henry Mountains overview.

Interested persons may make oral statements to the Council between 1:15 p.m. and 2:15 p.m. or file written comments for the Council's consideration. Anyone wishing to make an oral statement must notify the District Manager, Bureau of Land Management, 150 East 900 North, Richfield, Utah 84701 (801–896–8221). For further information contact: Bert Hart, District Public Affairs Specialist at the above address.

Dated: April 17, 1991.

Sam Rowley,

Assistant District Manager, Resources.

[FR Doc. 91–9790 Filed 4–24–91; 8:45 am]

BILLING CODE 4310-DQ-M

[CA-940-01-5410-10-B018; CACA 27922]

California; Conveyance of Mineral Interests in California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of segregation.

SUMMARY: The private lands described in this notice, aggregating 1,119.64 acres, are segregated and made unavailable for filings under the general mining laws and the mineral leasing laws to determine their suitability for conveyance of the reserved mineral interest pursuant to section 209 of the Federal Land Policy and Management Act of October 21, 1976.

The mineral interests will be conveyed in whole in part upon favorable mineral examination.

The purpose is to allow consolidation of surface and subsurface of minerals ownership where there are no known mineral values or in those instances where the reservation interferes with or precludes appropriate nonmineral development and such development is a more beneficial use of the land than the mineral development.

FOR FURTHER INFORMATION CONTACT: Judy Bowers, California State Office, Federal Office Building, 2800 Cottage Way, room E–2845, Sacramento, California 95825, (916) 978–4820. Serial No. CACA 27922.

T. 29 N., R. 9 W., Mount Diablo Meridian

Sec. 24, lots 1 through 4, S½N½, SE¼;
Sec. 11, N½NE¼, E½NW¼, NW¼SE¼;
Sec. 12, N½, E½SE¼, SW¼SE¼.

County—Shasta.

Minerals Reservation—All coal and other minerals.

Upon publication of this notice of segregation in the **Federal Register** as provided in 43 CFR 2720.1–1(b), the mineral interests owned by the United States in the private lands covered by the application shall be segregated to the extent that they will not be subject to appropriation under the mining and mineral leasing laws. The segregative effect of the application shall terminate by publication of an opening order in the **Federal Register** specifying the date and time of opening; upon issuance of a patent or other document of conveyance to such mineral interests; or two years from the date of publication of this notice, whichever occurs first.

Dated: April 17, 1991.

Judy E. Bowers,

Acting Chief, Lands Section.

[FR Doc. 91–9722 Filed 4–24–91; 8:45 am]

BILLING CODE 4310-40-M

[CA-940-01-4212-24; CACA 27690]

California; Conveyance of Mineral Interests in California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of segregative effect—conveyance of the reserved mineral interests.

SUMMARY: This notice will correct an error in the land description to add lands inadvertently omitted in an application for the conveyance of mineral interest.

FOR FURTHER INFORMATION CONTACT: Judy Bowers, BLM California State Office, Federal Office Building, 2800 Cottage Way, room E–2845, Sacramento, California 95825–1889, (916) 978–4820. The land description for serial No. CACA 27680, 55 FR 53199, December 27, 1990 is hereby corrected as follows:

T. 11 N., R. 13 W., San Bernardino Meridian
Sec. 4, SW¼W½ lot 2 NE¼, E½SW¼ NW¼SE¼.

Dated: April 15, 1991.

Nancy J. Alex,

Chief, Lands Section.

[FR Doc. 91–9731 Filed 4–24–91; 8:45 am]

BILLING CODE 4310-40-M

[NV-930-01-4212-14; N-54350]

Elko County, NV; Realty Action: Direct Sale of Public Land in Elko County, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action, proposed direct sale of public lands.

SUMMARY: The following described public lands administered by the Bureau of Land Management have been examined and identified as suitable for sale to the city of Carlin under section 203 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701, 1713) at no less than fair market value:

Mount Diablo Meridian,

T. 33 N., R. 52 E.
Section 22, SW¼NE¼, N½NW¼, E½E½ SW¼NW¼, S½SW¼SW¼NW¼, SW¼SE¼SW¼NW¼, SE¼NW¼, N½SW¼, E½SE¼SW¼, SE¼.

Containing 437.50 acres.

The described lands will be offered by direct sale to the city of Carlin. The lands have been specifically identified as suitable for disposal for community expansion purposes by the Elko Resource Management Plan. The lands are not needed for any resource program and are not suitable for management by the Bureau or any federal department or agency.

The locatable and salable mineral estates have been determined to have no value. The land is prospectively valuable for oil and gas; therefore, the mineral estate, excluding oil and gas, can be conveyed simultaneously with the surface estate in accordance with section 209(b)(1) of FLPMA. Acceptance of a direct sale offer will constitute an application for conveyance of the mineral interests. The city of Carlin will be required to submit a $50.00 nonrefundable fee with the purchase price for conveyance of the mineral interests specified above. Failure to submit the purchase money and the nonrefundable filing fee for the mineral estate within the time frame specified by the authorized officer will result in cancellation of the sale.

The patent, when issued, will contain the following reservations to the United States.

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States, Act of August 30, 1890, 26 Stat. 391; 43 U.S.C. 945.

2. Oil and gas.

And will be subject to.

1. Those rights for telephone purposes which have been granted to Nevada Bell, its successors or assignees, by right-of-way grant Elko–01655 under the authority of the Act of March 4, 1911 (36 Stat. 1253; 43 U.S.C. 961) and amended under the authority of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761).

2. Those rights for telephone line purposes which have been granted to Nevada Bell, its successors or assignees, by right-of-way grant CC–021089 under the authority of the Act of March 4, 1911 (36 Stat. 1253; 43 U.S.C. 961) and amended under the authority of the Act

of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761).

3. Those rights for gas pipeline purposes which have been granted to the Southwest Gas Corporation, its successors or assignees, by right-of-way grant Nev-064954 under the authority of the Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. 185, Section 28).

4. Those rights for highway purposes which have been granted to the Nevada Department of Transportation, its successors or assignees, by right-of-way grant Nev-067173 under the authority of the Act of August 27, 1958 (72 Stat. 916; 23 U.S.C. 317).

5. Those rights for powerline purposes which have been granted to Wells Rural Electric Co., its successors or assignees, by right-of-way grant N-3863 under the authority of March 4, 1911 (36 Stat. 1253; 43 U.S.C. 961).

6. Those rights for substation and access road purposes which have been granted to Wells Rural Electric Co., its successors or assignees, by right-of-way grant N-38134 under the authority of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761).

7. Those rights for a buried telephone cable which have been granted to CP National, its successors or assignees, by right-of-way grant N-41621 under the authority of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761).

8. Those rights for powerline purposes which have been granted to Sierra Pacific Power Co., its successors or assignees, by right-of-way grant N-46186 under the authority of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761).

9. Those rights for a buried fiber optic communications cable which have been granted to AT&T, its successors or assignees, by right-of-way grant N-46266 under the authority of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761).

10. Those rights for a buried telephone cable which have been granted to CP National, its successors or assignees, by right-of-way grant N-51955 under the authority of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761).

In addition, the described lands would be conveyed subject to the privileges of Lee and Betty Taylor to graze domestic livestock on the lands according to the terms and conditions of Grazing Permit number 01587 for 28 AUMs within the Taylor Carlin Grazing Allotment which shall be continued until termination of the Grazing Permit on February 28, 1992.

Although addressed in previous notices of Realty Action regarding sale of the land to the city of Carlin, it has been determined after further analysis that no direct loss of AUMs will result within the Marys Mountain Grazing Allotment to Melvin Jones Ranches (16 AUMs) and Elko Land and Livestock Co. (4 AUMs which are currently leased to Lee and Betty Taylor) as a result of this land disposal action.

The city of Carlin will be entitled to receive annual grazing fees up until the expiration date of the Grazing Permit of Lee and Betty Taylor for the use of the Taylor Carlin Grazing Allotment located east of State Route 766 at a rate not to exceed that which would be authorized in the grazing fee schedule published annually in the **Federal Register**.

Publication of this notice in the **Federal Register** will segregate the subject lands from all appropriations under the public land laws, including the mining laws, but not the mineral leasing laws. The segregation will terminate upon issuance of the patent or other document of conveyance, or upon publication in the **Federal Register** of a termination of segregation, or 270 days from date of publication, whichever occurs first.

The land will be offered for sale no later than 60 days after date of publication of this notice in the **Federal Register**. For a period of 45 days from the date of this notice, interested parties may submit comments to the District Manager, Bureau of Land Management, 3900 E. Idaho Street, Elko, Nevada 89801. Any adverse comments will be reviewed by the Nevada State Director, who may sustain, vacate, or modify this realty action and issue a final determination. In the absence of timely filed objections this realty action will become the final determination of the Department of the Interior.

Dated: April 15, 1991.

Rodney Harris,

District Manager.

[FR Doc. 91-9765 Filed 4-24-91; 8:45 am]

BILLING CODE 4310-HC-M

[NV-930-91-4212-14; N-50236]

Realty Actions; Sales, Leases, etc.: Nevada

ACTION: Notice of Realty Action advertisement of public land to be sold by the Bureau of Land Management (BLM) by modified competitive land sale procedures, N-50236. The lands are located within Humboldt County, Nevada.

SUMMARY: Notice is hereby given that pursuant to the Act of October 21, 1976 (43 U.S.C. 1713, section 203), the BLM is selling parcels of public land at fair market value, the following describes the land to be sold by modified competitive land sale procedures.

Mount Diablo Meridian, Nevada

T. 37 N., R. 38 E., Sec. 33, SE¼SE¼SW¼, SE¼NE¼SE¼
20 Acres.

Appraised fair market value for the above parcels is $5000.00 or $250.00 per acre.

DATE: Effective April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Hal Green, District Realty Specialist, 705 East 4th Street, Winnemucca, NV 89445, (702) 623-1539.

SUPPLEMENTARY INFORMATION: The land is being offered for public sale by the BLM in order to facilitate and enhance land use compatibility with an adjoining private landowner. The lands are recommended for disposal through the Winnemucca District's land use planning process, the Management Framework Plan, which has been prepared for the Paradise-Denio Resource Area. This plan has been coordinated and approved with the concurrence of the Humboldt County Planning Commission and Humboldt County Commissioners. Public interest is served by offering these parcels of public land for sale. The land will be sold by modified competitive land sale procedures with a preference right given to the adjoining landowner. The sale will involve a Partial Estate, surface only. The mineral estate, being owned by another party, will not be a part of this sale. Modified competitive land sale procedures will require the bidder to submit a written bid for no less than fair market value as indicated above. Each bid submitted will be accompanied by a certified check, postal money order, bank draft, or cashier's check for no less than 20% or ⅕ of the total amount bid for the parcels. Under modified competitive land sale procedures, an apparent high bid will be declared by the BLM. The apparent high bidder and the adjacent landowner (designated bidder) will be notified. The adjacent landowner (designated bidder) will have three (3) days from the date of the sale to exercise the preference consideration to meet the high bid. Should the designated bidder fail to submit a bid that matches the apparent high bid within the specified time period, the apparent high bidder shall be declared high bidder and awarded the sale. The apparent high bidder will be allowed 180 days from the date of sale to submit the remainder of the purchase price due for the parcels. This amount will be paid by cash, certified check, postal money order, bank draft, or cashier's check being made payable to the Dept. of the Interior-BLM. Failure to meet the

conditions established for this sale will void the sale and any money received for the sale will be forfeited as proceeds of the sale to the BLM.

Bid Procedures

Sealed bids for no less than the appraised fair market value as determined by government appraisal will be received until June 19, 1991, 4:30 p.m. Pacific Standard Time. The bid envelope must be marked on the lower left corner with BLM Land Sale-Do Not Open and Sale Date.

The bid must be for not less than the appraised Fair Market Value (FMV) as specified in this notice. Each bid submitted will contain 20% or ⅕ of the total amount bid for the parcels. Any bids not conforming to the sale conditions or received after the above date and time will not be considered and will be returned to the bidders. In the event that two or more written high bids have been submitted in the same amount, the determination of which is to be considered the highest bid shall be by submission of new sealed bids by those bidders. In the event that no bids are received on the parcels, the public lands described in this sale proposal would remain for sale, over the counter for a period of 90 days from the date of the sale. Interested parties may inquire about the parcels of land at the Bureau of Land Management, Winnemucca District Office, 705 East 4th Street, Winnemucca, NV 89445, during the office hours of 7:30 a.m. to 4:30 p.m., Monday through Friday. The parcels would be available for sale on a first come, first served basis, all conditions of the sale applying. The Authorized Officer may withdraw the land from sale if it is determined that consummation of the sale is found to be inconsistent with the provisions of existing law or policy.

Publication of this notice in the **Federal Register** shall segregate the public lands to the extent that they will not be subject to appropriation under the public land laws. Any subsequent application shall not be considered as filed and shall be returned to the applicant. This segregative effect of the Notice of Realty Action shall terminate upon issuance of the patent or other document of conveyance to the land or upon publication in the **Federal Register** of a termination of the segregation or 270 days from the date of publication of this notice, whichever occurs first.

This sale is consistent with the Federal regulations contained in title 43 Code of Federal Regulations, part 2700.

Reservations to the Federal Government

1. Rights-of-way for ditches and canals to be constructed under the Authority of the United States, Act of August 30, 1890, 26 Stat. 391 (43 U.S.C. 945).

Federal law requires that all bidders must be U.S. citizens, 18 years old or older, or in the case of corporations, be subject to the laws of any state of the United States. Proof of these requirements must accompany the bid.

For a period of 45 days from the date of this Notice, interested parties may submit comment to the District Manager, Winnemucca District Office, Bureau of Land Management, 705 East 4th Street, Winnemucca, NV 89445. In the absence of comment, objections, this notice will become the final determination of the Department of the Interior-BLM.

Dated: April 15, 1991.

Ron Wenker,

District Manager, Winnemucca.

[FR Doc. 91-9729 Filed 4-24-91; 8:45 am]

BILLING CODE 4310-4C-M

[AZ-942-01-4730-12]

Arizona State Office; Filing of Plats of Survey

April 16, 1991.

1. The plats of survey of the following described lands were officially filed in the Arizona State Office, Phoenix, Arizona, on the dates indicated:

A plat, representing a dependent resurvey of a portion of the subdivisional lines, and the subdivision of section 23, in Township 4 North, Range 1 East, Gila and Salt River Meridian, Arizona, was accepted January 30, 1991, and was officially filed February 4, 1991.

This plat was prepared at the request of the Bureau of Land Management, Law Enforcement Office.

A plat, representing a dependent resurvey of portions of the east and north boundaries in Township 31 North, Range 10 East, Gila and Salt River Meridian, Arizona, was accepted March 6, 1991, and was officially filed March 18, 1991.

A plat, representing a dependent resurvey of a portion of the subdivisional lines, and a survey of the subdivision of section 24, in Township 25 North, Range 28 East, Gila and Salt River Meridian, Arizona, was accepted February 5, 1991, and was officially filed February 6, 1991.

A plat, (in three sheets), representing a dependent resurvey of the Sixth Standard Parallel North through Range 29 East, the east and west boundaries, a portion of the north boundary and the subdivisional lines, and a survey of the subdivision of certain sections in Township 25 North, Range 29 East, Gila and Salt River Meridian, Arizona, was accepted February 5, 1991, and was officially filed February 6, 1991.

A plat, representing a dependent resurvey of a portion of the subdivisional lines, and a survey of the subdivision of section 6 in Township 25 North, Range 30 East, Gila and Salt River Meridian, Arizona, was accepted February 5, 1991, and was officially filed February 6, 1991.

A plat, (in seven sheets), representing a dependent resurvey of a portion of the south and west boundaries, a portion of the subdivisional lines and certain tracts, and the subdivision of certain sections and a metes-and-bounds survey in Township 32 North, Range 11 East, Gila and Salt River Meridian, Arizona, was accepted March 6, 1991, and was officially filed March 18, 1991.

These plats were prepared at the request of the Bureau of Indian Affairs, Navajo Project Office.

A plat, representing a dependent resurvey of a portion of the subdivisional lines and a portion of the 1960–61 meanders of the left bank of the Colorado River, and a survey of the fixed and limiting boundary of the 1902–03 left bank of the Colorado River in Township 7 South, Range 22 West, Gila and Salt River Meridian, Arizona, was accepted February 8, 1991, and was officially filed February 13, 1991.

This plat was prepared at the request of the Bureau of Land Management, Yuma District Office.

A plat, (in nine sheets), representing a dependent resurvey of a portion of the south, east and west boundaries, the subdivisional lines and the survey of the subdivision of certain sections and the dependent resurvey of certain mining claims and mineral segregation in section 25 in Township 10 North, Range 5 West, Gila and Salt River Meridian, Arizona, was accepted February 8, 1991, and was officially filed February 20, 1991.

A supplemental plat showing new lottings in section 14, Township 2 South, Range 4 West, Gila and Salt River Meridian, Arizona, was accepted February 25, 1991, and was officially filed February 27, 1991.

These plats were prepared at the request of the Bureau of Land Management, Phoenix District Office.

A plat, representing a dependent resurvey of a portion of the east boundary and a portion of the subdivisional lines in Township 14 South, Range 30 East, Gila and Salt

River Meridian, Arizona, was accepted March 19, 1991, and was officially filed March 21, 1991.

This plat was prepared at the request of the Bureau of Land Management, Safford District Office.

A plat, (in three sheets), representing a dependent resurvey of a portion of the north boundary and the subdivisional lines, and the subdivisions of selected sections and metes-and-bounds surveys in Township 7 North, Range 27 East, Gila and Salt River Meridian, Arizona, was accepted February 20, 1991, and was officially filed February 26, 1991.

This plat was prepared at the request of the Federal Land Exchange and the U.S. Forest Service, Apache-Sitgreaves National Forest.

A plat, (in three sheets), representing a dependent resurvey of a portion of the north boundary and a portion of the subdivisional lines, and a survey of sections 3, 8, 10, 15, 17, and 29, in Township 22 North, Range 8 East, Gila and Salt River Meridian, Arizona, was accepted February 28, 1991, and was officially filed March 11, 1991.

This plat was prepared at the request of the U.S. Forest Service, Coconino National Forest.

2. These plats will immediately become the basic records for describing the land for all authorized purposes. These plats have been placed in the open files and are available to the public for information only.

3. All inquiries relating to these lands should be sent to the Arizona State Office, Bureau of Land Management, P.O. Box 16563, Phoenix, Arizona 85011.

James P. Kelley,

Chief, Branch of Cadastral Survey.

[FR Doc. 91-9732 Filed 4-24-91; 8:45 am]

BILLING CODE 4310-32-M

[OR-942-00-4730-12: GP1-190]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Oregon State Office, Portland, Oregon, thirty (30) calendar days from the date of this publication.

Willamette Meridian

Oregon

T. 1 S., R. 9 W., accepted April 9, 1991
T. 13 S., R. 10 W., accepted April 12, 1991
T. 13 S., R. 10½ W., accepted April 12, 1991
T. 41 S., R. 12 W., accepted April 12, 1991

If protests against a survey, as shown on any of the above plat(s), are received prior to the date of official filing, the filing will be stayed pending consideration of the protest(s). A plat will not be officially filed until the day after all protests have been dismissed and become final or appeals from the dismissal affirmed.

The plat(s) will be placed in the open files of the Oregon State Office, Bureau of Land Management, 1300 NE. 44th Avenue, Portland, Oregon 97213, and will be available to the public as a matter of information only. Copies of the plat(s) may be obtained from the above office upon required payment. A person or party who wishes to protest against a survey must file with the State Director, Bureau of Land Management, Portland, Oregon, a notice that they wish to protest prior to the proposed official filing date given above. A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty (30) days after the proposed official filing date.

The above-listed plats represent dependent resurveys, survey and subdivision.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 1300 NE. 44th Avenue, P.O. Box 2965, Portland, Oregon 97208.

Dated: April 17, 1991.

Robert E. Mollohan,

Chief, Branch of Lands and Minerals Operations.

[FR Doc. 91-9723 Filed 4-24-91; 8:45 am]

BILLING CODE 4310-33-M

[ID-943-01-4214-10; IDI-27805, I-2508]

Proposed Withdrawal and Opportunity for Public Meeting; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management proposes to retain an existing withdrawal for 20 years for 2.50 acres of public land in Ada County to protect the Boise BLM District Office complex. The land is presently closed to surface entry and mining by a withdrawal which is no longer needed by the Forest Service. The land will remain open to mineral leasing. The withdrawal would be retained and jurisdiction of the lands transferred to the Bureau of Land Management under the proposal.

DATES: July 24, 1991.

ADDRESSES: Comments and meeting requests should be sent to the Idaho State Director, BLM, 3380 Americana Terrace, Boise, Idaho, 83706.

FOR FURTHER INFORMATION CONTACT: William E. Ireland, BLM, Idaho State Office, 3380 Americana Terrace, Boise, ID 83706, (208) 334-1517.

SUPPLEMENTARY INFORMATION: On April 8, 1991, a petition was approved allowing the Bureau of Land Management to file an application to withdraw the following described public lands from settlement, sale, location or entry under the general land laws, including the mining laws, subject to valid existing rights:

Boise Meridian, Idaho

T. 3N., R. 2E.,
Sec. 27, SE¼NW¼NE¼SW¼.

The area described contains 2.50 acres in Ada County.

The purpose of the proposed withdrawal is to protect the Boise BLM District Office Complex.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the undersigned officer within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

The land remains segregated by an existing withdrawal which has been relinquished by the Forest Service. Upon approval of the application the existing withdrawal will be retained and jurisdiction of the lands will be transferred to the Bureau of Land Management for use as an administrative site.

Dated: April 16, 1991.

William E. Ireland,

Chief, Realty Operations Section.

[FR Doc. 91-9728 Filed 4-24-91; 8:45 am]

BILLING CODE 4310-GG-M

[NM-940-4214-11; NMNM 056318]

Proposed Continuation of Withdrawal; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Forest Service, U.S. Department of Agriculture, proposes that a 67.50-acre withdrawal for the Questa Administrative Site and Eagle Rock Lake Recreation Area (formerly Questa Administrative Site) continue for an additional 20 years. The land will remain closed to mining and will be opened to surface entry. The land has been and remains open to mineral leasing.

DATES: Comments should be received by July 24, 1991.

ADDRESSES: Comments should be sent to the New Mexico State Director, BLM, P.O. Box 1449, Santa Fe, New Mexico 87504-1449.

FOR FURTHER INFORMATION CONTACT: Clarence F. Hougland, BLM, New Mexico State Office, 505-988-6071.

SUPPLEMENTARY INFORMATION: The Forest Service, U.S. Department of Agriculture proposes that the existing land withdrawal made by Public Land Order No. 2368 be continued for a period of 20 years for the Questa Administrative Site and Eagle Rock Lake Recreation Area (formerly Questa Administrative Site) pursuant to section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751, 43 U.S.C. 1714. The land is described as follows:

New Mexico Principal Meridian, Carson National Forest

Questa Administrative Site and Eagle Rock Lake Recreation Area (Formerly Questa Administrative Site).

T. 29 N., R. 13 E.,
Sec. 32, S½NE¼SE¼, E½SE¼NW¼SE¼, and NE¼NE¼SW¼SE¼, unsurveyed;
Sec. 33, S½NW¼SW¼ and S½NE¼SW¼, unsurveyed.

The area described contains 67.50 acres in Taos County.

The purpose of the withdrawal is for use as the residence site for some District personnel, crew quarters, the District office, and other facilities, and for the protection of substantial capital improvements on the Questa Administrative Site and Eagle Rock Recreation Area. The withdrawal closed the described land to mining and surface entry but not to mineral leasing. This action will open the land to surface entry. The land will remain open to mineral leasing, and closed to mining.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments in connection with the proposed withdrawal continuation may present their views in writing to the New Mexico State Director at the address indicated above.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the land and its resources.

A report will be prepared for consideration by the Secretary of the Interior, the President, and Congress, who will determine whether the withdrawal will be continued, and if so, for how long. The final determination on the continuation of the withdrawal will be published in the **Federal Register**. The existing withdrawal will continue until such final determination is made.

Dated: April 16, 1991.

Frank Splendoria,

Acting, State Director.

[FR Doc. 91-9730 Filed 4-24-91; 8:45 am]

BILLING CODE 4310-FB-M

Minerals Management Service (MMS)

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collections of information and related forms may be obtained by contacting the Bureau's Clearance Officer at the telephone number listed below. Comments and suggestions on the proposal should be made directly to the Bureau Clearance Officer and to the Office of Management and Budget; Paperwork Reduction Project (1010-0041); Washington, DC 20503, telephone (202) 395-7340, with copies to John V. Mirabella; Acting Chief, Engineering and Standards Branch; Engineering and Technology Division; Mail Stop 4700; Minerals Management Service; 381 Elden Street; Herndon, Virginia 22070-4817.

Title: 30 CFR Part 250, Subpart K, Production Rates.

OMB approval number: 1010-0041.

Abstract: The information submitted by respondents is used by MMS in its efforts to conserve natural resources, prevent waste, and protect correlative rights including the Government's royalty interest.

Bureau form number: None.

Frequency: Varies.

Description of respondents: Federal Outer Continental Shelf oil and gas lessees.

Estimated completion time: 4.4 hours.

Annual responses: 1,021.

Recordkeeping hours: 111.

Annual burden hours: 4,603.

Bureau clearance officer: Dorothy Christopher, (703) 787-1239.

Dated: March 26, 1991.

Richard J. Glynn,

Acting Associate Director for Offshore Minerals Management.

[FR Doc. 91-9768 Filed 4-24-91; 8:45 am]

BILLING CODE 4310-MR-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-515 (Preliminary)]

Portable Electric Typewriters From Singapore

AGENCY: United States International Trade Commission.

ACTION: Institution and scheduling of a preliminary antidumping investigation.

SUMMARY: The Commission hereby gives notice of the institution of preliminary antidumping investigation No. 731-TA-515 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Singapore of portable electric typewriters, provided for in subheadings 8469.10.00 and 8469.21.00 of the Harmonized Tariff Schedule of the United States,[1] that are alleged to be

[1] For purposes of this investigation, portable electric typewriters are defined as machines that produce letters and characters in sequence directly on a piece of paper or other media from a keyboard input and meeting the following criteria: they must (1) Be easily portable; with a handle and/or carrying case, or similar mechanism to facilitate their portability; (2) Be electric, regardless of source of power; (3) Be comprised of a single, integrated unit (e.g., not in two or more pieces); (4) Have a keyboard embedded in the chassis or frame of the machine; (5) Have a built-in printer; (6) Have a platen (roller) to accommodate paper; (7) Only accommodate their own dedicated or captive software. The portable electric typewriters subject to this investigation are those provided for in HTS subheading 8469.21.00 and those with text memory (automatics) provided for in HTS subheading 8469.10.00.

sold in the United States at less than fair value. The Commission must complete preliminary antidumping investigations in 45 days, or in this case by June 3, 1991.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201, as amended by 56 FR 11918, Mar. 21, 1991), and part 207, subparts A and B (19 CFR part 207, as amended by 56 FR 11918, Mar. 21, 1991).

EFFECTIVE DATE: April 18, 1991.

FOR FURTHER INFORMATION CONTACT: Jim McClure (202–252–1191), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–252–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–252–1000.

SUPPLEMENTARY INFORMATION:

Background. This investigation is being instituted in response to a petition filed on April 18, 1991, by Brother Industries (USA), Bartlett, TN.

Participation in the investigation and public service list. Persons (other than petitioners) wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in §§ 201.11 and 207.10 of the Commission's rules, not later than seven (7) days after publication of this notice in the Federal Register. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list. Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this preliminary investigation available to authorized applicants under the APO issued in the investigation, provided that the application be made not later than seven (7) days after the publication of this notice in the Federal Register. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference. The Commission's Director of Operations has scheduled a conference in connection with this investigation for 9:30 a.m. on May 9, 1991, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Parties wishing to participate in the conference should contact Jim McClure (202–252–1191) not later than May 6, 1991, to arrange for their appearance. Parties in support of the imposition of antidumping duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions. As provided in §§ 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before May 13, 1991, a written brief containing information and arguments pertinent to the subject matter of the investigation. Parties may file written testimony in connection with their presentation at the conference no later than three (3) days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: April 19, 1991.

Kenneth R. Mason,

Secretary.

[FR Doc. 91–9775 Filed 4–24–91; 8:45 am]

BILLING CODE 7020–02–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research Act of 1984—the SQL Access Group, Inc.

Notice is hereby given that, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 et seq. ("the Act"), The SQL Access Group, Inc. ("the Group") on March 21, 1991, has filed an additional written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing additions to its membership. The additional notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

On March 1, 1990, the Group filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to section 6(b) of the Act on April 5, 1990 (55 FR 12750). On June 5, 1990, August 31, 1990, and December 6, 1990, the Group filed additional written notifications. The Department published a notice in the Federal Register in response to the additional notifications on July 18, 1990 (55 FR 29277), October 17, 1990 (55 FR 42081), and January 7, 1991 (56 FR 536), respectively.

The identities of the additional parties to the Group are:

Apple Computer, Inc., 20525 Mariani Ave., Cupertino, CA 95014.

Borland International, Inc., 1800 Green Hills Drive, Scotts Valley, CA 95066.

Microelectronics and Computer Technology Corp. (MCC), 3500 West Balcones Center Dr., Austin, TX 78759–6509.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 91–9720 Filed 4–24–91; 8:45 am]

BILLING CODE 4410–01–M

MERIT SYSTEMS PROTECTION BOARD

Advisory Committee on Federal Workforce Quality Assessment; Meeting

AGENCY: Merit Systems Protection Board.

ACTION: Notice of advisory committee meeting.

SUMMARY: The Merit Systems Protection Board and Office of Personnel Management are holding an open meeting of the jointly sponsored advisory committee. According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that a meeting of the Advisory Committee on Federal Workforce Quality Assessment will be held on May 23, 1991, from 8:30 a.m. to 4 p.m. at the U.S. Office of Personnel Management, room 1350, 1900 E Street, NW., Washington, DC. The committee will review OPM and MSPB data collection efforts to date and will

discuss subcommittee findings regarding the elements of OPM's workforce quality assessment model.

FOP FURTHER INFORMATION CONTACT: Karen Robinson, Office of Policy and Evaluation, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419, (202) 653–5812.

Dated: April 19, 1991.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 91–9770 Filed 4–24–91; 8:45 am]

BILLING CODE 7400–01–M

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Astronomical Sciences; Meeting

In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Science Foundation announces the following meeting:

Name: Advisory Committee for Astronomical Sciences.

Date and Time: May 13 and 14, 1991, 8:30 am–5 pm.

Place: National Science Foundation, room 543.

Type of Meeting: May 13 and 14, open.

Contact Person: Dr. Julie H. Lutz, Director, Division of Astronomical Sciences, Room 615, National Science Foundation, Washington, DC 20550 (202/357–9488).

Purpose of Committee: To provide advice and recommendations concerning research programs, proposals, and projects in NSF-funded astronomy with the objective of achieving the highest quality forefront research for the funds allocated. To provide advice and recommendations concerning short-range and long-range plans in astronomy, including a recommendation of relative priorities.

Monday, May 13

Agenda: Discussion of Decade of Discovery Report, report of Long-Range Planning and Priorities Subcommittee, and 1992 and 1993 budget.

Tuesday, May 14

Discussion of report on millimeter array, EHR status report, AST organizational matters, and ACAST resolutions.

Dated: April 22, 1991.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 91–9752 Filed 4–24–91; 8:45 am]

BILLING CODE 7555–01–M

Division of Atmospheric Sciences Special Emphasis Panel; Notice of Meeting

SUMMARY: In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to review and evaluate proposals and provide advice and recommendations as part of the selection process for awards. Because the proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with proposals, the meetings are closed to the public. These matters are within exemptions (4) and (6) of 5 U.S.C., 552b(c), Government in the Sunshine Act.

Name: Special Emphasis Panel in Atmospheric Sciences.

Date: May 13 and 14, 1991.

Time: 9 a.m. to 5 p.m. each day.

Place: Room 523, National Science Foundation, 1800 G Street, NW., Washington, DC.

Type of Meeting: Closed.

Agenda: Review and evaluation of Geospace Environment Modeling (GEM) Applications.

Contact: Dr. Paul B. Dusenbery, Program Director, Magnetospheric Physics Program, Division of Atmospheric Sciences, National Science Foundation, Washington, DC (202) 357–0040.

Dated: April 22, 1991.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 91–9756 Filed 4–24–91; 8:45 am]

BILLING CODE 7555–01–M

Advisory Panel for Geography and Regional Science; Meeting

The National Science Foundation announces the following meeting:

Name: Advisory Panel for Geography and Regional Science.

Date/Time: May 13, 1991; 8:30 a.m. to 6 p.m., May 14, 1991; 8:30 a.m. to 5 p.m.

Place: Room 1243, National Science Foundation, 1800 G St., NW., Washington, DC 20550.

Type of Meeting: Closed.

Contact Person: Dr. Thomas J. Baerwald, Program Director, Geography and Regional Science, National Science Foundation, 1800 G St., NW.; Room 336, Washington, DC 20550, Telephone: 202/357–7326

Purpose of Meeting: To provide advice and recommendations concerning research proposals in Geography and Regional Science.

Agenda: To review and evaluate research proposals as part of the selection process for awards.

Reason for Closing: The proposals reviewed contained information of a proprietary or confidential nature, including technical information, financial data (such as salaries), and personal information concerning individuals associated with the proposals. These matters are within the exemptions (4) and (6) of 5 U.S.C. 552b, Government in the Sunshine Act. February 18, 1977.

Dated: April 22, 1991.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 91–9753 Filed 4–24–91; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel; Notice of Meeting

The National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Materials Research.

Date: May 16 and 17, 1991.

Location: Massachusetts Institute of Technology, Boston, Massachusetts.

Time: 8 a.m. to 5 p.m., each day.

Type of Meeting: Closed.

Contact Person: Dr. Adriaan M. de Graaf, Deputy Division Director, Division of Materials Research, Room 408, National Science Foundation, Washington, DC 20550 Telephone: (202) 357–9794.

Purpose of meeting: To provide advice and recommendations concerning the support for the Massachusetts Institute of Technology Francis Bitter National Magnet Laboratory.

Reason for Closing: The proposal being reviewed includes information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposal. These matters are within exemptions (4) and (6) of 5 U.S.C. 552b(c), Government in the Sunshine Act.

Dated: April 22, 1991.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 91–9754 Filed 4–24–91; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panels; Notice of Meetings

SUMMARY: In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting(s) to be held at 1800 G, Street, NW., Washington, DC 20550 (except where otherwise indicated).

SUPPLEMENTARY INFORMATION: The purpose of the meetings is to provide advice and recommendations to the National Science Foundation concerning the support of research, engineering, and science education. The agenda is to review and evaluate proposals as part of the selection process for awards. The

entire meeting is closed to the public because the panels are reviewing proposals that include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are within exemptions (4) and (6) of 5 U.S.C. 552b(c), the Government in the Sunshine Act.

CONTACT PERSON: M. Rebecca Winkler, Committee Management Officer, Room 208, 357–7363.

Dated: April 22, 1991.

M. Rebecca Winkler,

Committee Management Officer.

Committee name	Agenda	Room [1]	Date(s)	Times
Special Emphasis Panel in Mechanical and Structural Systems	Proposal Review	1133	05/16/91 05/17/91	8:30 am–5:00 pm. 8:30 am–5:00 pm.
Special Emphasis Panel in Human Resource Development	Res. Improvement in Minority Institutions Pro	1225	05/16/91 05/17/91	8:30 am–5:00 pm. 8:30 am–5:00 pm.

[1] At 1800 G Street, NW., Washington, DC

[FR Doc. 91–9755 Filed 4–24–91; 8:45 am]
BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–320]

General Public Utilities Nuclear Corp.; Consideration of Issuance of Amendment to Facility Operating License and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operation License No. DPR–73 issued to General Public Utilities Nuclear Corporation (the licensee) for operation of Three Mile Island Nuclear Station Unit 2 located in Dauphin County, Pennsylvania.

The licensee requested the amendment, including associated changes in the appendix A Technical Specifications for Unit 2, in a letter dated August 16, 1988. The licensee's request has been amended nine times with the most recent amendment dated November 7, 1990. The licensee's amendment request would change the current TMI–2 operating license to a possession only license and modify the current Technical Specifications to allow for long-term storage of the facility. This storage period is termed Post-Defueling Monitored Storage or PDMS by the licensee.

Since the March 28, 1979 accident at TMI–2, the licensee has been engaged in a long-term cleanup and defueling effort at the facility. As the effort progressed, and the full extent of the damage and level of contamination became known, the licensee determined that placing the facility in long-term storage after achieving a safe, stable, and defueled plant figuration would be appropriate. This storage period would result in personnel dose savings due to radioactive decay, postpone destructive decontamination efforts which might affect Unit 1 operation, employ technological advances in remote decontamination techniques thereby resulting in further occupational dose savings, and also allow cost savings due to a reduction in contamination by radioactive decay.

The licensee proposes to place the facility in long-term storage until the end of Three Mile Island Unit 1 operation. The Three Mile Island Unit 1 license expires on April 19, 2014. At the end of the storage period, the licensee would begin decommissioning both Three Mile Island Unit 1 and Unit 2 for ultimate release of the facility for unrestricted access.

On December 2, 1986, the licensee submitted a plan for maintaining plant conditions during PDMS. On September 19, 1988, the licensee submitted the Post Defueling Monitored Storage Safety Analysis Report which included a request for the possession only license and proposed changes to the Technical Specifications to allow for PDMS. The proposed changes include a reduction in radiation monitoring and fire detection requirements. They also include elimination of technical specifications related to flood protection, testing of sealed sources, maintenance and testing of reactor building purge, auxiliary building, and fuel handling building ventilation systems and the requirement to maintain the containment under negative pressure. The staff issued the Final Supplement No. 3 to the Final Programatic Environmental Impact Statement on the TMI–2 cleanup (NUREG–0683) on September 22, 1989. The staff's safety evaluation report has not yet been issued.

Prior to issuance of the proposed possession only license and the license amendment allowing PDMS, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By May 28, 1991, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding may file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the Local Public Document Room located at the State Library of Pennsylvania Government Publications Section, Education Building, Walnut Street and Commonwealth Avenue, Harrisburg, Pennsylvania 17126. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the

petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such as amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendments under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 2120 L Street, NW. Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–(800) 352–6000 (in Missouri 1–(800) 342–6700. The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Seymour H. Weiss: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Thomas A. Baxter, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW, Washington, DC 20037, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i)–(v) and 2.714(d).

For further details with respect to this action, see the licensee's submittal dated December 2, 1986, the licensee's application for amendment and Safety Analysis Report dated September 19, 1988 as revised through Amendment 9 dated November 7, 1990, and the NRC staff's Final Supplement No. 3 to NUREG–0683 dated August 1989. These documents are available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC 20555.

Dated at Rockville, Maryland, this 19th day of April 1991.

For the Nuclear Regulatory Commission.

Seymour H. Weiss,

Director, Non-Power Reactors, Decommissioning and Environmental Project Directorate Division of Advanced Reactors and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 91–9791 Filed 4–24–91; 8:45 am]

BILLING CODE 7590–01–M

POSTAL RATE COMMISSION

[Order No. 881 and Docket No. A91–2]

Before Commissioners: George W. Haley, Chairman; Henry R. Folsom, Vice-Chairman; John W. Crutcher; W. H. "Trey" LeBlanc III; Patti Birge Tyson; Order Accepting Appeal and Establishing Procedural Schedule Under 39 U.S.C. 404(b)(5)

Issued April 18, 1991

In the Matter of: Northboro, Iowa 51647, (Phyllis and Stanley Bloom, Petitioners).

Docket Number: A91–2.

Name of Affected Post Office: Northboro, Iowa 51647.

Name(s) of Petitioner(s): Phyllis and Stanley Bloom.

Type of Determination: Closing.

Date of Filing of Appeal Papers: April 12, 1991.

Categories of Issues Apparently Raised:

1. Effect on postal services [39 U.S.C. 404(b)(2)(C)]

Other legal issues may be disclosed by the record when it is filed; or, conversely, the determination made by the Postal Service may be found to dispose of one or more of these issues.

In the interest of expedition, in light of the 120-day decision schedule [39 U.S.C. 404(b)(5)], the Commission reserves the right to request of the Postal Service memoranda of law on any appropriate issue. If requested, such memoranda will be due 20 days from the issuance of the request; a copy shall be served on the petitioner. In a brief or motion to dismiss or affirm, the Postal Service may incorporate by reference any such memoranda previously filed.

The Commission orders:

(A) The record in this appeal shall be filed on or before April 29, 1991.

(B) The Secretary shall publish this Notice and Order and Procedural Schedule in the **Federal Register.**

By the Commission.

Charles L. Clapp,

Secretary.

Appendix

April 12, 1991: Filing of Petition.
April 18, 1991: Notice and Order of Filing of Appeal.
May 7, 1991: Last day of filing of petitions to intervene [*see* 39 CFR 3001.111(b)].
May 17, 1991: Petitioner's Participant Statement or Initial Brief [*see* 39 CFR 3001.115(a) and (b)].
June 6, 1991: Postal Service Answering Brief [*see* 39 CFR 3001.115(c)].
June 21, 1991: Petitioner's Reply Brief should petitioner choose to file one [*see* 39 CFR 3001.115(d)].

June 28, 1991: Deadline for motions by any party requesting oral argument. The Commission will schedule oral argument only when it is a necessary addition to the written filings [*see* 39 CFR 3001.116].

August 10, 1991: Expiration of 120-day decisional schedule [*see* 39 U.S.C. 404(b)(5)].

[FR Doc. 91-9698 Filed 4-24-91; 8:45 am]

BILLING CODE 7710-FW-M

RESOLUTION TRUST CORPORATION

Contractor Ethics Suspension and Exclusion Procedures

AGENCY: Resolution Trust Corporation.

ACTION: Notice of availability.

SUMMARY: The Resolution Trust Corporation ("RTC") has adopted procedures to provide for the suspension and/or exclusion of contractors from RTC contracting and/or the rescission of RTC contracts to ensure ethical integrity and full compliance with 12 CFR part 1606 and 12 U.S.C. 1441a(p)(1) through (p)(8) in all phases of contracting. It is the purpose of this Notice to alert all current and prospective contractors that the procedures are available for inspection and copying by the public.

EFFECTIVE DATES: The procedures for suspending or excluding registered contractors from RTC contracting, denial of contract awards and rescission of contracts for violations of the Independent Contractor Regulations and Ethical Standards of Conduct, 12 CFR part 1606, were effective upon their adoption on April 10, 1991.

ADDRESSES: Copies of the procedures may be obtained in person or by writing to the RTC Public Reading Room, 801 17th Street, NW., Washington, DC 20434-0001. The hours of operation are 9 a.m. to 5 p.m. Copies may also be requested by calling the Public Reading Room at (202) 416-6940.

FOR FURTHER INFORMATION CONTACT: Arthur Kusinski, Ethics Officer, Resolution Trust Corporation, (202) 416-7469, or Charles Loveless, Senior Ethics Specialist, Resolution Trust Corporation, (202) 416-4396. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 at 12 U.S.C. 1441a(p)(1) through (p)(8) requires that the RTC prohibit any person who does not meet minimum standards of competence, experience, integrity and fitness from entering into any contract with or performing any service for the RTC and authorizes the RTC to rescind awarded contracts when there is a failure to meet the minimum regulatory standards. Regulations implementing these statutory directives were published on February 14, 1990, at 12 CFR part 1606 (55 FR 5346). The RTC is hereby announcing the adoption of procedures that allow for the prompt suspension or exclusion from RTC contracting and/or rescission of awarded contracts of contractors who have violated the regulations while, at the same time, providing contractors with due process safeguards when the RTC finds it necessary to take adverse actions.

Signed at Washington, DC this 10th day of April 1991.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 91-8874 Filed 4-24-91; 8:45 am]

BILLING CODE 6714-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-29101; File No. SR-NASD-91-15]

Self-Regulatory Organizations; Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Effectiveness and Publicity of Disciplinary Sanctions

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on April 4, 1991, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of section 19(b)(1) under the Act, the NASD is herewith filing a proposed rule change to the Resolution of the Board of Governors—Notice to Membership and Press of Suspensions, Expulsions, Revocations, and Monetary Sanctions under article V, section 1 of the Rules of Fair Practice to conform with the current practices of the NASD with respect to the effectiveness and publicity of disciplinary sanctions. Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

Resolution of the Board of Governors; Notice to Membership and Press of Suspensions, Expulsions, Revocations, and Monetary Sanctions

* * * * *

If a decision of a District Business Conduct Committee is not appealed to or called for review by the Board of Governors, the order of the District Business Conduct Committee shall become effective on a date set by the Association but not before the expiration of *45* [30] days after the date of decision. Notices of decisions imposing monetary sanctions of $10,000 or more or penalties of expulsion, revocation, suspension and/or the barring of a person from being associated with all members shall promptly be transmitted to the membership and to the press, concurrently; provided, however, no such notice shall be sent prior to the expiration of *45* [30] days from the date of the said decision.

Notwithstanding the preceding paragraph, expulsions and bars imposed pursuant to the provisions of Article II, Sections 10 and 11 of the Code of Procedure shall become effective upon approval or acceptance by the National Business Conduct Committee, and publicity regarding any sanctions imposed pursuant to Article II, Sections 10 and 11 of the Code may be issued immediately upon such approval or acceptance.

* * * * *

If a decision of the Board of Governors is not appealed to the Securities and Exchange Commission, the [decision] *sanctions specified in the decision (other than bars and expulsions)* shall become effective on a date established by the Association but not before the expiration of 30 days after the date of the decision. *Bars and expulsions, however, shall become effective upon issuance of the decision of the Board Governors, unless the decision specifies otherwise.* Notices of decisions imposing monetary sanctions of $10,000 or more or penalties of expulsion, revocation, suspension and/or the barring of a person from being associated with all members shall promptly be transmitted to the membership and to the press, concurrently; provided, however, no such notice shall be sent prior to the expiration of 30 days from the date of the said decision.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

The NASD is proposing three changes to the Resolution of the Board of Governors—Notice to Membership and Press of Suspensions, Expulsions, Revocations, and Monetary Sanctions ("Resolution") dealing with publication to membership and the press of disciplinary sanctions imposed. The first change concerns the date on which bars become effective. At its March 1991 meeting, the Board of Governors approved amending the Resolution to permit bars to be imposed in disciplinary proceedings immediately upon the issuance of the Board of Governors' decision. This policy was previously approved by the National Business Conduct Committee ("NBCC"), a standing committee of the Board of Governors, at its meeting in September 1989, which concluded that language to this effect should be included in the text of the decision in order to avoid confusion on the part of the respondents or their counsel. The NASD remains consistent in its belief that the public interest is well seved by the immediate imposition of bars and expulsions. The NASD, therefore, proposes to amend the Resolution to conform with the current practice and alleviate any contradiction.

The NASD further proposes to amend the portion of the Resolution which states that a District Business Conduct Committee ("DBCC") decision may become effective, and thus its sanctions publicized, after the expiration of a 30-day delay period following the date of decision. It has been the practice of the NASD to refrain from seeking to enforce sanctions during the 30-day period following the issuance of the decision. This suggests that a DBCC decision may become effective, and its sanctions made known to the public, during the last 15 days of the 45-day period in which the NBCC has the prerogative of calling a decision for review. Accordingly, the NASD is proposing to amend the Resolution, to clarify that the sanctions imposed in the DBCC decisions do not become effective and will not be publicized until 45 days after the DBCC's decision.

Finally, the NASD is proposing to add a new paragraph to the Resolution to clarify that sanctions imposed pursuant to an offer of settlement ("offer") or an acceptance waiver and consent ("AWC") are effective and may be publicized immediately upon approval by the NBCC. A respondent waives all rights to appeal when he or she accepts an offer or AWC. Thus, the need for a delay period, during which a respondent may seek SEC review or the Board of Governors may call a matter for review, is eliminated due to the finality of the settlement, and the sanctions may therefore be instituted immediately.

The NASD believes that the proposed rule change is consistent with the provisions of sections 15A(b)(7) and 15A(b)(8) of the Act, which requires that the rules of a national securities association include provisions to assure that members and persons associated with members be appropriately and fairly disciplined for violations of any provision of the Act, the rules and regulations promulgated thereunder, the MSRB Rules, or the Association's Rules. The proposed change will clarify the measures already in place to carry out this purpose.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by May 16, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Dated: April 18, 1991.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–9704 Filed 4–24–91; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–29105; File No. SR–NASD–91–10]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Electronic Filing of FOCUS Information

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 [1] ("Act" and rule 19b–4 thereunder [2] on March 7, 1991 [3] the National Association of

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1989).

[3] The proposed rule change was originally filed on February 15, 1991 to be reviewed under Section 19(b)(3)(A) of the Act. On March 7, 1991, prior to publication of the notice of filing of the rule change in the **Federal Register**, the NASD submitted a letter requesting that the rule change be reviewed under Section 19(b)(2) of the Act in order to allow for public comment. See letter from T. Grant Callery, Vice President and Deputy General Counsel, NASD, to Katherine A. England, Branch Chief, SEC, dated March 7, 1991.

By letter dated April 12, 1991, the NASD submitted an amended Personal Identification

Continued

Securities Dealers, Inc. ("NASD") submitted a proposed rule change to the Securities and Exchange Commission ("SEC or "Commission"). The proposed rule change was submitted in conjunction with a new plan for the implementation of FOCUS Reports ("FOCUS Plan") filed by the NASD pursuant to rule 17a–5(a)(4)[4] of the Securities Exchange Act ("Rule"). Under the FOCUS Plan, as amended, FOCUS information will be filed with the NASD electronically, not by paper filings. However, this new requirement will not apply to the filing of the annual audited financial statement filed pursuant to rule 17a–5(d), which will continue to be a paper filing. There is no change to the type of information to be filed or to the frequency of filing. This order approves the proposed rule change, as amended.

Notice of the proposal together with its terms of substance was provided by the issuance of a Commission release (Securities Exchange Act Release No. 28957, March 11, 1991) and publication in the **Federal Register** (56 FR 11477, March 18, 1991). No comments were received on the proposed rule change.

In 1975, the Commission adopted the FOCUS Report as part of an effort to streamline financial and operational reporting by broker/dealers. Simultaneously, the Commission approved a plan submitted by the NASD pursuant to rule 17a–5 that permitted NASD members to file FOCUS information with the NASD (which would then forward such information to the Commission) to further consolidate the process. (See Securities Exchange Act Release No. 11935, December 17, 1975.)

After approval of the instant proposed rule change, NASD members will begin to sumit FOCUS information to the NASD electronically. The NASD anticipates that all June 1991 filings will be made electronically. The NASD believes that NASDnet, the new Electronic FOCUS Filing System, will ease the administrative burden and reduce costs related to the filing and analysis of FOCUS Reports.

Under the rule change, as amended [5] security in the system will be maintained by the use of electronic mail user identification and passwords. In addition, the FOCUS Plan requires filing of PIN registration Forms with the NASD, which will identify, for purposes of both security and regulatory responsibility, the notarized signature of the registered Principal(s) responsible for the member's FOCUS filings.

Because the new system will further centralize and automate the analysis of FOCUS information, and because the NASD expects that it will make timely and accurate reporting of FOCUS information easier for the member, the NASD believes that the benefits of the new system will outweigh the relatively low cost it will impose on members for new equipment or service bureau charges.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD and, in particular, the requirements of section 15A(b)(6)[6] of the Act which requires, in part, that the rules of a national securities association be designed to "foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market."

It is therefore ordered, pursuant to section 19(b)(2) of the act, that the above-mentioned proposed rule change be, and hereby is, approved.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.[7]

Dated: April 18, 1991.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–9702 Filed 4–24–91; 8:45 am]

BILLING CODE 8010–01–M

Number ("PIN") Registration Form under its Plan For the Implementation of FOCUS Reports ("FOCUS Plan"). The amended PIN Registration Form includes in the signature execution block a statement that the principal signing the form agrees that the use of the PIN represents his/her signature, thus, certifying the veracity of the FOCUS Report. See letter from T. Grant Callery, Vice President and Deputy General Counsel, NASD, to Katherine A. England, Branch Chief, SEC, dated April 12, 1991.

[4] 17 CFR 240.17a–5 (1981).

[5] Supra, note 3.

[6] 15 U.S.C. 78o–3 (1982).

[7] 17 CFR 200.30–3(a)(12) (1989).

[Release No. 34–29103; File No. SR–PHLX–91–18]

Self-Regulatory Organizations; Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to the Listing of Long-Term Equity Options

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on March 29, 1991, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PHLX proposes to amend Exchange Rule 1012, Commentary .03 to provide for the listing of long-term equity options which expire up to thirty-nine months from the date of issuance.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Recently, the Commission approved a PHLX proposal allowing the Exchange to list long-term equity options that expire 12 to 24 months from the time they are listed.[1] The PHLX proposes to amend Exchange Rule 1012, Commentary .03 to permit the listing of long-term equity options that expire up to 39 months from the time they are listed. The Exchange believes that the proposal responds to the continuing needs of market participants, particularly portfolio managers and other institutional customers, by providing protection from long-term market moves and by offering an alternative to hedging portfolios with futures positions or off-exchange customized derivative instruments.

[1] See Securities Exchange Act Release No. 28910 (February 22, 1991), 56 FR 9032 (order approving SR–PHLX–90–38) ("Long-Term Option Approval Order"). The Long-Term Option Approval Order also authorized the listing of stock index options that expire twelve to thirty-six months from the time they are opened for trading.

Specifically, by increasing the number of expiration months for long-term equity options from four to six, the proposal will allow the PHLX to list equity options with two expirations between 25 and 39 months, in addition to the four potential expirations between 12 and 24 months. The PHLX proposes that new expiration months will be determined by the expiration cycle of the corresponding short term options. The Exchange intends to list all long-term equity options on one day chosen by the PHLX, which will be a date other than the Monday following the Friday on which the near-term month expires. The PHLX believes that listing all three-year, long-term equity options at one time will provide investors with a wider choice of investments.

The PHLX notes that strike price interval, bid/ask differential, and continuity rules will not apply to three-year equity options until the time remaining to expiration is nine months.[2] The current strike price interval requirements and bid/ask differential and continuity rules applicable to equity options are based on options that expire nine months from the time they begin trading. Accordingly, because there is no basis at this time for establishing accurate prices for long-term equity options that will expire 39 months from the time they begin trading, the Exchange believes it is appropriate not to apply these rules until the time remaining to expiration is nine months.

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange since the proposal will add liquidity to the market by allowing market participants to hedge the risks of their stock and index portfolios over a longer time period with a known and limited cost. In addition, the Exchange believes that the proposal is consistent with section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade and to protect the investing public.

B. Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any burden on competition.

[2] This is consistent with the approach taken with respect to options expiring 12 to 24 months from the date of issuance. See Long-Term Option Approval Order, supra note 1.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has requested that the proposed rule change be given accelerated effectiveness pursuant to section 19(b)(2) of the Act.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6(b)(5).[3] Specifically, the Commission believes that the proposed rule change is designed to provide investors with additional means to hedge equity portfolios from long-term market risk, thereby facilitating transactions in options and contributing to the protection of investors and the maintenance of fair and orderly markets. Specifically, by allowing investors to lock in their hedges for up to 39 months, the PHLX proposal will permit investors to protect better their portfolios from adverse long-term market moves. The PHLX, as well as the American Stock Exchange ("AMEX"), the Chicago Board Options Exchange ("CBOE") and the Pacific Stock Exchange ("PSE"), currently list long-term equity options with expirations of up to two years. These options have met with some initial enthusiasm from market participants. By extending these options out to 39 months, the PHLX is providing an additional product for investors who desire a long-term hedge. Further, long-term options will allow this protection to be provided at a known and limited cost. Finally, the proposal will provide institutions with an alternative to hedging portfolios with off-exchange customized options or warrants.

The Commission notes that strike price interval, bid/ask differential, and continuity rules will not apply to such long-term option series until the time to expiration is less nine months. This approach is consistent with the approach taken by the Amex, CBOE and PSE [4] because of the lack of historical pricing data for long-term options. Strike price interval requirements, bid/ask differential and continuity rules applicable to equity options currently are based on options that expire nine from the time they begin trading. Therefore, there currently is no basis for establishing accurate prices for long-term equity options that will expire 39 months from the time they begin trading.

The Commission notes that although specific bid/ask differential and price continuity rules will not apply to long-term equity options that have over nine months to expiration, the PHLX's general rules that obligate PHLX specialists and ROTs to maintain fair and orderly markets will continue to apply.[5] The Commission believes that the requirements of these rules are broad enough, even in the absence of bid/ask differential and continuity requirements, to provide the Exchange with the authority to make a finding of inadequate specialist or ROT performance should these specialists or ROTs enter into transactions or make bids or offers (or fail to do so) in long-term options that are inconsistent with the maintenance of a fair and orderly market. Finally, the Commission notes that the bid/ask differential and continuity rules will apply to the long-term equity options when the time remaining until expiration is less than nine months.

The Commission also finds that the PHLX proposal to increase the number of expiration months from four to six is reasonable since it will permit the PHLX to list options with two expirations between 25 and 39 months, in addition to the four potential expirations between 12 and 24 months. The Commission does not believe that increasing the number of expiration months to six will cause, by itself, a proliferation of expiration months since the PHLX has stated that it will not list more than two expirations between 25 and 39 months. Nevertheless, the

[3] 15 U.S.C. 78f(b)(5) (1988).

[4] See Securities Exchange Act Release Nos. 28914 (February 25, 1991), 56 FR 9029 (order approving SR-PSE-91-07 and SR-AMEX-91-02, providing for listing of equity options with up to 39 months to expiration), 28890 (February 15, 1991), 56 FR 7439 (order approving SR-CBOE-90-32, permitting the trading of three-year Long-Term Equity Anticipation Securities), 25041 (October 16, 1987), 52 FR 40008 (October 26, 1987) (order approving SR-AMEX-87-22, providing for the trading of long-term index options on the Amex), 24853 (August 27, 1987), 52 FR 33486 (order approving SR-CBOE-87-24, providing for the trading of long-term index and equity options on the CBOE), 28514 (October 3, 1990) 55 FR 41400 (order approving SR-AMEX-90-18, providing for the trading of equity options with up to 24 months to expiration on the Amex), and 28589 (October 31, 1990), 55 FR 46882 (order approving SR-PSE-90-35, providing for the listing of index and equity options with up to 36 and 24 months to expiration, respectively, on the PSE).

[5] See, e.g., Exchange Rules 1014 and 1020. See also Long-Term Option Approval Order, supra note 1.

Commission requests that the PHLX monitor the volume of additional options series listed as a result of this rule change and the effect on the PHLX's system capacity and quotation dissemination displays.

Finally, the Commission believes that the PHLX's proposal to list all three-year long-term equity options at one time is a reasonable exercise of its business judgment. In addition, the Commission does not believe that listing all long-term options on a date other than the Monday following the Friday on which the near-term months expire raises any significant regulatory issues.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register** because the PHLX's proposed rule change is identical to proposals submitted by the Amex, CBOE, and PSE to list equity options that expire up to 39 months after the date of issuance, which the Commission has already approved.[6] The Commission received no comments on those proposals. Thus, the Commission believes it is appropriate to approve the proposed rule change on an accelerated basis so that the PHLX can begin trading equity options that expire up to 39 months after the date of issuance, which will facilitate competition among the exchanges for product services to the benefit of public investors. The Commission believes, therefore, that granting accelerated approval of the proposed rule change is appropriate and consistent with section 6 of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by May 16, 1991.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (SR–PHLX–91–18) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Dated: April 18, 1991.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–9703 Filed 4–24–91; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–29104; File No. SR–PSE–91–01]

Self-Regulatory Organizations; Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Pacific Stock Exchange, Inc., Relating to an Extension and Expansion of the Pacific Options Exchange Trading System Pilot Program

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on February 11, 1991, the Pacific Stock Exchange, Incorporated ("PSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in items I, II and III below, which Items have been prepared by the self-regulatory organization.[1] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PSE proposes to extend until July 31, 1992, its pilot program of an automated options trading system designated as the Pacific Options Exchange Trading System ("POETS"),[2] and to implement the Auto-Ex feature of POETS floor-wide.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In January 1990 the Exchange began implementation of POETS on a pilot basis.[3] By the end of July 1990, POETS, except for Auto-Ex, had been implemented floor-wide.[4] In January 1991, the Commission approved the Exchange's request to extend the pilot program until June 30, 1991, in order to provide the Exchange with the time to assess fully the merits of the system.[5] At that time, the PSE agreed to advise the Commission of the results of its evaluation prior to seeking permanent approval of the system.[6] The PSE represents that since the implementation of POETS, the Exchange has conducted and monitored the performance of the various features of the system under a variety of trading situations. To ensure that POETS is dependable, the

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[6] See Securities Exchange Act Release Nos. 28914 and 28890, supra note 4.

[7] 15 U.S.C. 78s(b)(2) (1988).

[8] 17 CFR 200.30–3(a)(12) (1990).

[1] The PSE revised its original proposal by Amendment No. 1, which was filed with the Commission on March 29, 1991. On April 5, 1991, the Exchange filed an additional amendment clarifying the length of the proposed extension of the pilot program. *See* letter from Esther M.W. Aw, Regulation Administrator, PSE, to Thomas Gira, Branch Chief, Options Regulation, SEC, dated April 5, 1991 ("PSE letter").

[2] The Commission approved the PSE's POETS system on a six-month pilot basis on January 18, 1990. *See* Securities Exchange Act Release No. 27633 (January 18, 1990), 55 FR 2466 (order approving File SR–PSE–89–26) ("POETS approval Order"). The initial six-month approval expired on July 22, 1990, and was extended until October 22, 1990, in oreder to allow the PSE to complete installation of the system's hardware. *See* Securities Exchange Act Release No. 28264 (July 26, 1990), 55 FR 31272 (order approving File No. SR–PSE–90–28) ("POETS Extension Order"). In January 1991, the POETS pilot program was extended until June 30, 1991. *See* Securities Exchange Act Release No. 28778 (January 14, 1991), 56 FR 2576 (order approving File No. SR–PSE–90–36) ("January Extension Order"). POETS is a completely automated trading system ("ORS"), an automatic and semi-automatic execution system ("Auto-Ex"), an on-line limit order book system ("Auto-Book"), and an automatic market quote update system ("Auto-Quote").

[3] *See* POETS Approval Order, *supra*, note 2, for a description of POETS. The automatic execution feature of POETS, however, was limited to implementation in all equity options classes at two trading posts and any option which becomes multiply traded.

[4] *See* POETS Extension Order, *supra* note 2.

[5] *See* January Extension Order, *supra* note 2.

[6] *See* January Extension Order, *supra* note 2.

Exchange utilized a facility known as the Systems Network Analysis Program/Simulated Host Overview Technique ("Snap/Shot"), provided by IBM to evaluate the capacity of the system.[7] According to the PSE, the results of the Snap/Shot simulation present no evidence indicating that Auto-Ex operating at its full capacity on a floor-wide basis will adversely effect the overall performance of POETS.

Based, in part, on the results of the Snap/Shot simulation, the Exchange believes that POETS and its various features (ORS, Auto-Ex, Auto-Book and Auto-Quote) is a viable and effective trading system. The PSE states that internal and external security measures have been implemented to provide users with confidence in the system. Moreover, the Exchange indicates that, as part of its contingency plan, all fundamental components within POETS are redundant in order to ensure additional protection against system failures.

The PSE believes that the strength of the system is apparent from the accuracy with which it reports and handles small public customer orders, booked orders and market quotes. Moreover, the Exchange maintains that POETS has provided, and continues to provide, substantial benefits to the investing public. Accordingly, the PSE requests that the Commission approve both the extension of POETS on a pilot basis until July 31, 1992, and the floor-wide implementation of Auto-Ex.

The PSE believes that the proposed rule change is consistent with section 6(b) of the Act, in general, and furthers the objectives of section 6(b)(5), in particular, in that the trading system promotes just and equitable principals of trade while affording protection to investors and the public interest.[8] In addition, the Exchange believes that the proposal is consistent with section 11A(a)(1)(B) in that it facilitates an environment that serves to promote an efficient and fair marketplace, resulting in benefits to the public and to the securities industry.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes a burden on competition.

(C) Self-Regulatory Organization's Statement or Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has requested that the proposed rule change be given accelerated effectiveness pursuant to section 19(b)[2] of the Act.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6 thereunder.[9] In particular, the Commission finds that the proposal is consistent with section 6(b)(5) based on the PSE's representation, supported by the results of the Snap/Shot simulation and the PSE's observation of POETS, that POETS is a viable and effective trading system. In particular, the PSE has found that the system accurately reports and handles small public customer orders, booked orders and market quotes, and has provided substantial benefits to the investing public. The Commission finds, as it has in the past,[10] that the enhanced efficiency of order processing resulting from POETS should help the PSE to provide deeper, more liquid and efficient options markets. In addition, POETS has supplied the PSE's Regulation Department with more accurate trade information, which should allow the Exchange to develop more accurate and timely audit trails, thereby helping the PSE to maintain the integrity of its markets.[11] The Commission notes that the PSE has strengthened POETS and increased user confidence in the system by implementing internal and external security measures and by making all fundamental components of POETS redundant in order to provide protection from system failures.

In addition, the Commission finds that the proposal to expand Auto-Ex is consistent with section 6(b)(5) of the Act because floor-wide implementation of Auto-Ex should enable the PSE to provide more efficient execution of customer orders, which will help the PSE to maintain the quality and efficiency of its options markets. In addition, the Commission notes that the Snap/Shot simulation did not indicate that floor-wide operation of Auto-Ex would adversely effect the overall performance of POETS.

The Commission finds good cause for approving the proposal prior to the thirtieth day of publication of this notice of filing in the **Federal Register** in order to permit uninterrupted the continuation of the pilot program. Because there have been no adverse comments concerning the pilot program since its implementation or prior to the Commission's approval of POETS in January 1990 and because of the importance of maintaining the quality and efficiency of the PSE's markets, the Commission believes good cause exists to approve the extension of the pilot program on an accelerated basis.

In addition, the Commission finds good cause to approve the floor-wide expansion of Auto-Ex on an accelerated basis in order to facilitate the orderly implementation of POETS and to allow the Exchange time to study fully the effects of full implementation of Auto-Ex before requesting permanent approval of the POETS pilot program. Auto-Ex has operated effectively to the extent it has been used, and the Commission has not received any negative comments regarding Auto-Ex since its inception. Finally, the Commission's approval is limited until July 31, 1992.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for

[7] Snap/Shot uses an advanced simulation technique to analyze system capacity under various conditions. Using empirical data gathered by IBM, the Snap/Shot model measures the "costs" associated with machine level operations on the hardwarr used in a defined environment. After defining the hardward, operating system and application environments, the Exchange conducted a Snap/Shot session which tested POETS under trading scenarios varied by assumptions concerning message traffic. The input assumptions were increased until the systems were operating at capacity. The Snap/Shot run, which simulated a 245,310 contract day, indicated that the response time and system performance of POETS were within acceptable limits. The average daily options contract volume on the PSE for 1990 was 54,798 contracts. As of February 1991, the average daily contract volume was 66,779.

[8] *See* PSE letter, *supra* note 1.

[9] 15 U.S.C. 78f(b)(5) (1988).

[10] *See* January Extension Order, *supra* note 2.

[11] *See* January Extension Order, *supra* note 2.

inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by May 16, 1991.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[12] that the proposed rule change (SR-PSE-91-01) relating to an extension of the POETS pilot program until July 31, 1992, and the floor-wide implementation of Auto-Ex, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Dated: April 18, 1991.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-9700 Filed 4-24-91; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-29092; File No. SR-SCCP-91-01]

Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Filing of Proposed Rule Change Relating to the Establishment of a Liability Notice Procedure for Book-Entry Deliverable Instruments With an Exercise Privilege

April 17, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on March 14, 1991, the Stock Clearing Corporation of Philadelphia ("SCCP") filed with the Securities and Exchange Commission ("Commission") the proposed rule change (SR-SCCP-91-01) as described in items I, II, and III below, which items have been prepared by SCCP. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

SCCP hereby files as a proposed rule change pursuant to Rule 19b-4 under the Act, proposed rule 40 relating to a liability notice procedure for book-entry deliverable instruments with an exercise privilege.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, SCCP included statements concerning the purpose of and statutory basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. SCCP has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to establish a SCCP Rule 40 relating to a liability notice procedure for book-entry deliverable instruments with an exercise privilege, such as the Nikkei 225 Stock Average Index warrants trading on designated National Securities Exchanges.[1] Unlike other instruments for which SCCP has liability notice procedures, e.g., securities subject to a tender or exchange offer at a time certain,[2] these instruments are unique because while they have a stated expiration they have the potential to be exercised at any time.

The exercise provisions for most index warrants require delivery of the warrants to the warrant agent on the day of exercise. Currently, a Participant who fails to receive the warrant and is thereby unable to exercise such warrant cannot hold anyone liable for the value of the exercise because SCCP's existing Liability Notice procedures are limited to the time period preceding the actual expiration of the warrant. SCCP, at the request of the Reorganization Division of the Securities Industry Association ("SIA"), has developed a procedure that would remedy this deficiency for book-entry deliverable issues.

Under the proposed rule change, Participants who have sold but not delivered book-entry deliverable index warrants and similar instruments would be advised of their potential liability based on their short positions on the CNS Projection Report starting on T+4. This report would put them on notice that they may be held liable for damages by a Participant with a long position who is prevented from exercising because of failure to receive the instrument. Participants with long positions or long settling trade positions who want to exercise must file a Notice of Intention to Exercise ("Notice") with SCCP specifying the number of securities they want to exercise ("Exercise Position").[3] The day the notice is filed is referred to as "N".[4] If the Exercise Position remains unfilled after allocation on N, SCCP will remove the long position from the CNS system before the allocation on N+1, and will remove a corresponding short position(s) based on a random allocation method. On the morning of N+1, SCCP will issue fail to receive and fail to deliver instructions naming a failing to receive Participant and a failing to deliver Participant. This ticket will allow a failing to receive Participant to claim damages from the failing to deliver Participant for losses that result from his/her inability to exercise the instrument. If exercises of the instrument are suspended according to the terms of the prospectus, the failing to deliver Participant's liability for damages to the failing to receive Participant would continue and would be established once the exercise occurred, or the liability could be satisfied by the delivery of the warrants before exercises resume.

The proposed rule change provides protection to a Participant with a long position in a security with an exercise privilege against the failure to deliver of a Participant with a short position in that security without affecting SCCP's ability to safeguard securities and funds in its custody or control. Accordingly, it is consistent with the requirements of section 17A of the Act and the rules and regulations thereunder applicable to SCCP.

(B) Self-Regulatory Organization's Statement on Burden on Competition

SCCP does not believe that the proposed rule change will impose any inappropriate burden on competition.

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[12] 15 U.S.C. 78s(b)(2) (1982).

[13] 17 CFR 200.30-3(a)(12) (1990).

[1] The index warrants currently trading are eligible to clear at SCCP and also are eligible for book-entry settlement at qualified securities depositories.

[2] SCCP's Liability Notice procedures attach liability to a failing to deliver Participant where, because of an expiring event, the failing to receive Participant is prevented from receiving the benefit of that event.

[3] Settling trades are the CNS contracts compared and accounted for by the Corporation for which such day is the settlement date.

[4] SCCP will establish time frames for submission of Notices after consultation with tender agents and will notify Participants of the time frame via an Administrative Bulletin.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Executive Committee of the Reorganization Division of the SIA and the SIA Sub-Committee on Index Warrants endorse the proposal. SCCP will notify the Commission of any written comments received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period: (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which SCCP consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any persons, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of SCCP. All submissions should refer to File No. SR–SCCP–91–01 and should be submitted by May 16, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–9701 Filed 4–24–91; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area #2497]

Texas; Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on April 12, 1991, I find that Cameron County in the State of Texas constitutes a disaster area as a result of damages caused by severe storms, tornadoes, and flooding beginning on April 5, 1991. Applications for loans for physical damage may be filed until the close of business on June 11, 1991, and for loans for economic injury until the close of business on January 13, 1992 at the address listed below: U.S. Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., suite 102, Ft. Worth, TX 76155, or other locally announced locations. In addition, applications for economic injury loans from small businesses located in the contiguous counties of Hidalgo and Willacy in the State of Texas may be filed until the specified date at the above location.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	8.000
Homeowners without Credit Available Elsewhere	4.000
Businesses with Credit Available Elsewhere	8.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000
Others (including Non-Profit Organizations) with Credit Available Elsewhere	9.125
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 249706 and for economic injury the number is 729600.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: April 18, 1991.

Michael E. Deegan,

Acting Assistant Administrator for Disaster Assistance.

[FR Doc. 91–9797 Filed 4–24–91; 8:45 am]

BILLING CODE 8025–01–M

TENNESSEE VALLEY AUTHORITY

Privacy Act of 1974; New Routine Use

AGENCY: Tennessee Valley Authority (TVA).

ACTION: New routine use for TVA–2, "Personnel Files—TVA," and TVA–26, "Retirement System Records—TVA."

SUMMARY: As required by the Privacy Act, TVA gave notice (56 FR 4119, February 1, 1991) of its intention to establish new routine uses for the systems of records entitled TVA–2, "Personnel Files—TVA," and TVA–26, "Retirement System Records—TVA. No comments from the public were received. The new routine uses as published on February 1, 1991, and as described below will therefore become a part of TVA–2 and TVA–26. The full text of TVA–2 appears at 55 FR 34817–18, August 24, 1990, and the full text of TVA–26 appears at 55 FR 34833–34, August 24, 1990.

EFFECTIVE DATE: April 25, 1991.

FOR FURTHER INFORMATION CONTACT: Ronald E. Brewer, Privacy Act Officer, TVA, 615–751–2520.

TVA–2

SYSTEM NAME:

Personnel Files—TVA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information related to education; qualifications; work history; interests and skills; test results; performance evaluation; career counseling; personnel actions; job description; salary and benefit information; service dates, including other Federal and military services; replies to congressional inquiries; medical data; and security investigation data.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Tennessee Valley Authority Act of 1933, 16 U.S.C. 831–831dd; Executive Order 10577; Executive Order 10450; Executive Order 11478; Executive Order 11222; Veterans' Preference Act of 1944, 58 Stat. 387, as amended; Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103; various sections of title 5 of the United States Code related to employment by TVA.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To provide an official of another Federal agency information needed in the performance of official duties related to reconciling or reconstructing data files, in support of the functions for which the records were collected and maintained.

TVA–26

SYSTEM NAME:

Retirement System Records –TVA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Personal identifying information; retirement, benefit and investment information; related correspondence; and legal documents.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Tennessee Valley Authority Act of 1933, 16 U.S.C. 831–831dd; Internal Revenue Code.

ROUTINE USE OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To Contractors and subcontractors of TVA or the Retirement System who are provided records maintenance or other similar support service to the Retirement System.

Louis S. Grande,

Vice President, Information Services.

[FR Doc. 91–9767 Filed 4–24–91; 8:45 am]

BILLING CODE 8120–08–M

DEPARTMENT OF TRANSPORTATION

Order Adjusting the Standard Foreign Fare Level Index

[Docket 37554]

The International Air Transportation Competition Act (IATCA), Public Law 96–192, requires that the Department, as successor to the Civil Aeronautics Board, establish a Standard Foreign Fare Level (SFFL) by adjusting the SFFL base periodically by percentage changes in actual operating costs per available seat-mile (ASM). Order 80–2–69 established the first interim SFFL, and Order 90–2–29 established the currently effective two-month SFFL applicable through March 31, 1991.

In establishing the SFFL for the two-month period beginning April 1, 1991, we have projected non-fuel costs based on the year ended December 31, 1990 data, and have determined fuel prices on the basis of the latest available experienced monthly fuel cost levels as reported to the Department.

These projections reflect moderating trends in fuel prices in the wake of the crisis in the Middle East.

By Order 91–4–27 fares may be increased by the following adjustment factors over the October 1979 levels:

Atlantic	1.6423
Latin America	1.5521
Pacific	2.1305
Canada	1.5663

For further information contact: Keith A. Shangraw (202) 366–2439.

By the Department of Transportation:

Date: April 18, 1991.

Jeffrey N. Shane,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 9788 Filed 4–24–91; 8:45 am]

BILLING CODE 4910–62–M

Office of the Secretary

Reports, Forms, and Recordkeeping Requirements; Submittals to OMB on April 17, 1991

AGENCY: Office of the Secretary, Department of Transportation (DOT.)

ACTION: Notice.

SUMMARY: This notice lists those forms, reports, and recordkeeping requirements imposed upon the public which were transmitted by the Department of Transportation on April 17, 1991, to the Office of Management and Budget (OMB) for its approval in accordance with the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35).

FOR FURTHER INFORMATION CONTACT: John Chandler, Annette Wilson or Susan Pickrel, Information Requirements Division, M–34, Office of the Secretary of Transportation, 400 Seventh Street, SW., Washington, DC 20590, telephone, (202) 366–4735, or Edward Clarke or Wayne Brough, Office of Management and Budget, New Executive Office Building, Room 3228, Washington, DC 20503, (202) 395–7340.

SUPPLEMENTARY INFORMATION:

Background

Section 3507 of title 44 of the United States Code, as adopted by the Paperwork Reduction Act of 1980, requires that agencies prepare a notice for publication in the **Federal Register**, listing those information collection requests submitted to the Office of Management and Budget (OMB) for initial, approval, or for removal under that Act. OMB reviews and approves agency submittals in accordance with criteria set forth in that Act. In carrying out its responsibilities, OMB also considers public comments on the proposed forms, reporting and recordkeeping requirements. OMB approval of an information collection requirement must be renewed at least once every three years.

Information Availability and Comments

Copies of the DOT information collection requests submitted to OMB may be obtained from the DOT officials listed in the "For Further Information Contact" paragraph set forth above. Comments on the requests should be forwarded, as quickly as possible, directly to the OMB officials listed in the "For Further Information Contact" paragraph set forth above. If you anticipate submitting substantive comments, but find that more than 10 days from the date of publication are needed to prepare them, please notify the OMB officials of your intent immediately.

Items Submitted for Review by OMB

The following information collection requests were submitted to OMB on April 17, 1991.

DOT No: 3472.

OMB No: 2135–0004.

Administration: Saint Lawrence Seaway Development Corporation.

Title: Seaway Explosives Permit.

Need for Information: To provide for safeguards when explosives are aboard vessels in Seaway System.

Proposed Use of Information: Information is used by Seaway entities in approving the Application for a Seaway Explosives Permit and Providing for certain safeguards in transiting the Seaway System.

Frequency: On Occasion.

Burden Estimate: 5 Hours.

Respondents: 5.

Form(s): SLSDC–LO–7–1–6200.31.

Average Burden Hours Per Response: 1 Hour.

DOT No: 3473.

OMB No: 2125–0010.

Administration: Federal Highway Administration.

Title: Bid Price Data.

Need for Information: For FHWA to monitor changes in purchasing power of the Federal-aid dollar and for FHWA to justify funding level recommendations to Congress.

Proposed Use of Information: To produce the National FHWA bid price index and related statistics used as an indicator of trends.

Frequency: On Occasion.

Burden Estimate: 484 Hours.

Respondents: State Highway Agencies.

Form(s): FHWA–45.

Average Burden hours Per Response: 45 minutes.

DOT No: 3474.

OMB No: 2115–0569.

Administration: U.S. Coast Guard.

Title: Self-Inspection of Fixed OCS Facilities.

Need for Information: This information collection requirement will serve as notification that the owner of a fixed OCS facility has inspected the facility for compliance with the Coast Guard regulations.

Proposed Use of Information: Coast Guard will use the information to focus on problem facilities and to assess the adequacy of the required items of safety equipment onboard OCS-facilities.

Frequency: Annually.

Burden Estimate: 11,217 Hours.

Respondents: Owners of fixed OCS facilities.

Form(s): CG–5432.

Average Burden Hours Per Response: 3 Hours.

DOT No: 3475.

OMB No: 2115–0016.

Administration: U.S. Coast Guard.

Title: Characteristics of Liquid Chemicals Proposed for Bulk Water Movement.

Need for Information: This collection of information is needed to enforce the laws and regulations for the safe transportation of hazardous materials by water.

Proposed Use of Information: Coast Guard evaluates the information to determine the kind and degree of precaution needed to protect the vessel, operating personnel, and public.

Frequency: On Occasion.

Burden Estimate: 300 Hours.

Respondents: Chemical manufacturers.

Form(s): CG–4355.

Average Burden Hours Per Response: 3 Hours.

DOT No: 3476.

OMB No: 2115–0074.

Administration: U.S. Coast Guard.

Title: Alternative compliance—72 Colregs and Inland Rules.

Need for Information: This information collection requirement is needed to justify the respondents request to deviate from the technical requirements of the International Regulations for Preventing Collisions at Sea, 1972, and the Inland Navigational Rules Act of 1980.

Proposed Use of Information: The information will be used to determine the need for alternative systems on the vessel and the conditions that will apply.

Frequency: On Occasion.

Burden Estimate: 135 Hours.

Respondents: Vessel owners, operators, builders and agents.

Form(s): Average Burden Hours Per Response: 1 hour and 30 minutes for reporting and 5 minutes for recordkeeping.

DOT No: 3477.

OMB No: 2130–0017.

Administration: Federal Railroad Administration.

Title: U.S. DOT—AAR Crossing Inventory Form.

Need for Information: This is the only National Inventory of Grade Crossing Information.

Proposed Use of Information: This voluntary information is used to evaluate causes of grade crossing accidents and to evaluate grade crossing improvements.

Frequency: On Occasion.

Estimated Number of Respondents: 250 Railroads and States.

Total Estimated Burden: 2,938 Hours.

Estimated Average Per Respondent: 17 minutes.

Form Number(s): FRA F 6180.71.

DOT No: 3478.

OMB No: New.

Administration: Federal Aviation Administration.

Title: Employment Standards—Parts 107 and 108 of the Federal Aviation Regulation.

Need for Information: The FAA needs the information to ensure that all air carriers and airports comply with the new hiring and continued employment standards to train all employees having unescorted access privileges to security areas.

Proposed Use of Information: The information is needed to ensure compliance with the new standards.

Frequency: This is a recordkeeping burden.

Burden Estimate: 16,283 hours.

Respondents: Airport operators and air carriers.

Form(s): None.

Average Burden Hours Per Response: Airport operators—15 minutes per trainee for recordkeeping and 30 minutes per year for each air carrier checkpoint for recordkeeping.

DOT No: 3479.

OMB No: 2106–0043.

Administration: Department of Transportation, Office of the Secretary.

Title: Part 215—Use and Change of Names of Air Carriers, Foreign Air Carriers, and Commuter Air Carriers.

Need for Information: To ensure that carriers do not advertise or operate in any name other than that in which they are authorized to do so by the Department.

Proposed Use of Information: To enable the Department and the public to identify the specific carriers offering or operating services.

Frequency: As necessary.

Burden Estimate: 505 Hours.

Respondents: 110.

Form(s): None.

Average Burden Hours Per Response: 4 hours and 36 minutes.

DOT No: 3480.

OMB No: 2106–0038.

Administration: Department of Transportation, Office of the Secretary.

Title: Part 204—Data to Support Fitness Determinations.

Need for Information: To establish the fitness of carriers seeking certificate or commuter authority.

Frequency: On occasion when seeking authority under sections 401 or 419 of the Federal Aviation Act.

Burden Estimate: 6,385 Hours.

Respondents: U.S. air carriers.

Form(s): None.

Average Burden Hours Per Response: 45 hours.

DOT No. 3481.

OMB No. 2106–0036.

Administration: Department of Transportation, Office of the Secretary.

Title: Foreign Air Freight Forwarders and Foreign Cooperative Shippers Associations—Title 14 CFR 297.

Need for Information: Regulatory compliance.

Proposed Use of Information: Financial protection for U.S. air freight forwarders and shippers associations.

Frequency: On Occasion.

Burden Estimate: 11.5 Hours.

Respondents: 23.

Form(s): 4506 (formerly CAB Form 297–A).

Average Burden Hours Per Response: 30 minutes.

DOT No: 3482.

OMB No: 2132–0008.

Administration: Urban Mass Transportation Administration.

Title: Section 15 Reporting System.

Need for Information: The data enables the operators to compare performance with peers and to assist local, State and the Federal Government and the general public in setting policy and in making investment decisions.

Proposed Use of Information: Selected Section 15 data are used to allocate Federal funds for assistance to transit agencies as authorized by Section 9 of the UMT Act of 1964, as amended.

Frequency: Annually.

Burden Estimate: 286,000 Hours.

Respondents: State and local governments, business or other for profit organizations.

Form(s): 001, 100, 200, 300 and the 400 series.

Average Burden Hours Per Response: 550 Hours.

DOT No: 3483.

OMB No: New.

Administration: Research and Special Programs Administration.

Title: Inspection and Burial of Offshore Gas and Hazardous Liquid Pipelines.

Need for Information: In accordance with P.L. 101–599, the information is needed to acquire information to

determine the extent of pipelines that are exposed or a hazard in the Gulf of Mexico.

Proposed Use of Information: In accordance with P.L. 101–599, the information will be used to later develop regulations for the mandatory systematic, and where appropriate, periodic inspections of pipelines in the Gulf of Mexico.

Frequency: One-time.

Burden Estimate: 5,400 Hours.

Respondents: 30 Pipeline operators.

Form(s): None.

Average Burden Hours Per Response: 180 Hours.

DOT No: 3484.

OMB No: 2105–0515.

Administration: Office of Commercial Space Transportation, Office of Secretary.

Title: Commercial Space Transportation, Licensing Regulations.

Need for Information: Licenses for Commercial Space Transportation activities are required to protect the public health and safety, national security and foreign policy interests of the United States.

Proposed Use of Information: It will be used to decide whether an applicant should be issued a license.

Frequency: On occasion.

Burden Estimate: 18,000 Hours.

Respondents: Organization Applying for Launch License.

Form(s): None.

Average Burden Hours Per Response: 400 Hours.

DOT No: 3485.

OMB No: 2127–0043.

Administration: National Highway Traffic Safety Administration.

Title: 49 CFR Part 566, Manufacturer Identification.

Need for Information: To identify manufacturers in the event of a recall.

Proposed Use of Information: Manufacturers of motor vehicles and/or motor vehicle equipment are required to submit their names, addresses, and a brief summary of the type of vehicle or equipment they manufacture to NHTSA. NHTSA uses the information to locate manufacturers in the event of a recall.

Frequency: On occasion.

Burden Estimate: 25 Hours.

Respondents: Manufacturers of motor vehicles/equipment.

Form(s): None.

Average Burden Hours Per Response: 15 minutes.

DOT No: 3486.

OMB No: 2133–0019.

Administration: Maritime Administration.

Title: Statement to determine income for renegotiation for agricultural commodities, U.S. to U.S.S.R. Final Voyage Report, and Schedules A, A–1, A–2, A–2a, A–3, A–3a, and A–4.

Need for Information: Required to obtain or retain a benefit.

Proposed Use of Information: To meet regulatory requirements.

Frequency: On occasion.

Burden Estimate: 4.

Respondents: 1.

Form(s): MA–782.

Average Burden Hours Per Response: 4.

DOT No: 3487.

OMB No: 2133–0029.

Administration: Maritime Administration.

Title: Shipbuilding Order Book and Shipyard Employment.

Need for Information: To comply with statutory and regulatory requirements.

Proposed Use of Information: Formulate national shipbuilding policies and to determine if adequate mobilization base exists.

Frequency: Quarterly.

Burden Estimate: 32.

Respondents: 16.

Form(s): MA–832.

Average Burden Hours Per Response: 30 minutes.

DOT No: 3488.

OMB No: New.

Administration: Urban Mass Transportation Administration.

Title: Extent of Substance Abuse in the Transit Industry.

Need for Information: To determine the extent, prevalence and types of substance in the transit industry nationwide, as well as its identifiable consequences, especially on safety.

Proposed Use of Information: This one-time survey of the transit industry will provide a snapshot of current industry substance abuse policies and programs. More importantly it will provide baseline data against which future reports would be compared as a timely measure of the programs' effectiveness and to monitor grantees' compliance with any future regulations.

Frequency: One-time.

Burden Estimate: Management survey: 460 hours; employee survey: 700 hours.

Respondents: Management survey: 400 transit systems; employee survey: 3,000 employees.

Form(s): None.

Average Burden Hours Per Response: Management survey: 69 min.; employee survey: 14 minutes.

DOT No.: 3489.

OMB No.: New.

Administration: Federal Aviation Administration.

Title: Airport Construction Guidelines.

Need for Information: This information is required to comply with congressionally mandated requirements for FAA to develop guidelines for airport design and construction, in consultation with airport authorities, air carriers, and appropriate officials. This one time survey will help in guideline development.

Proposed Use of Information: The FAA will conduct a survey examining various aspects of airport design at existing airports. Information gained will help enable FAA to issue guidelines that codify the best aspects of past designs, avoid past problems, and allow flexibility for future security requirements.

Frequency: One-time survey.

Burden Estimate: 480 Hours.

Respondents: Airport managers/personnel.

Form(s): None.

Average Burden Hours Per Response: 16 Hours.

DOT No.: 3490.

OMB No: 2120–0028.

Administration: Federal Aviation Administration.

Title: Operations Specifications.

Need for Information: The information is needed to approve the aircraft operators requests for operations specifications. The operations specifications are part of the operating certificate and prescribe such terms, conditions, and limitations as are necessary to ensure safety in air transportation.

Proposed Use of Information: Operations specifications information collected is used to determine applicant's eligibility. The information also becomes part of the air carrier operating certificate.

Frequency: On occasion.

Burden Estimate: 7,972 Hours.

Respondents: Air carriers operating under FAR Parts 121, 125, 129, and 135.

Form(s): FAA Forms 8400–1, 8400–1A, and 8400–7.

Average Burden Hours Per Response: 4 Hours.

DOT No: 3491.

OMB No.: 2125–0529.

Administration: Federal Aviation Administration.

Title: Preparation and Execution of the Project Agreement and Modifications.

Need for Information: To meet the requirements of Section 110 of Title 23 United States Code.

Proposed Use of Information: To formally document for Federal-aid highway projects mutual responsibilities of Federal and State officials who are

responsible for project approval and management.

Frequency: On Occasion.

Burden Estimate: 14,000 Hours.

Respondents: State highway agencies.

Form(s): PR–2, PR–2A, PR–2.1.

Average Burden Hours Per Response: 1 Hour.

DOT No: 3492.

OMB No.: 2106–0023.

Administration: Department of Transportation, Office of the Secretary.

Title: Procedures and Evidence Rules for Air Carrier Authority Applications.

Need for Information: To establish the fitness of carriers seeking economic authority.

Proposed Use of Information: To determine whether carriers are "fit" to engage in their proposed air transportation operations.

Frequency: On Occasion.

Burden Estimate: 8,048 Hours.

Respondents: U.S. air carriers.

Form(s): None.

Average Burden Hours Per Response: 39 hours and 48 minutes.

Issued in Washington, DC on April 17, 1991.

Richard B. Chapman,

Deputy Director of Information, Resource Management.

[FR Doc. 91–9787 Filed 4–24–91; 8:45 am]

BILLING CODE 4910–62–M

Coast Guard

[CGD–91–029]

National Boating Safety Advisory Council Subcommittee Meetings

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App.1), notice is hereby given of meetings of the National Boating Safety Advisory Council's Subcommittees on "Passengers for Consideration", Consumer Relations Review, Navigation Lights and Recreational Boating Standards Review to be held on Saturday, May 18, 1991, at the Compri Hotel, 4620 South Miami Blvd., Morrisville (Research Triangle Park), North Carolina. The Consumer Relations Review and the Recreational Boating Standards Review Subcommittee meetings will begin at 1:30 p.m. and end at 4 p.m. The "Passengers for Consideration" and Navigation Lights Subcommittees will begin at 4 p.m. and end at 5:30 p.m. The agenda for each meeting will be to review the status of various projects that have been undertaken by the subcommittee.

Attendance is open to the interested public. With advance notice to the Chairman, members of the public may present oral statements at the meetings. Persons wishing to present oral statements should so notify the Executive Director no later than the day before the meetings. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Mr. Albert J. Marmo, Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard, (G–NAB), Washington, DC 20593–0001, or by calling (202) 267–0997.

R.C. Houle,

Captain, US Coast Guard,

Dated: April 22, 1991.

[FR Doc. 91–9798 Filed 4–24–91; 8:45 am]

BILLING CODE 4910–14–M

[CGD–91–028]

National Boating Safety Advisory Council; Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App.1), notice is hereby given of a meeting of the National Boating Safety Advisory Council to be held on Monday and Tuesday, May 20 & 21, 1991 at the Compri Hotel, 4620 South Miami Blvd., Morrisville (Research Triangle Park), North Carolina, beginning at 9 a.m. and ending at 4 p.m. on both days. The agenda for the meeting will be as follows:

1. Review of action taken at the 46th meeting of the Council.
2. Members' items.
3. Executive Director's Report.
4. Recreational Boating Standards Review Subcommittee Report.
5. Report on the 1990 National Boating Education Seminar.
6. Consumer Relations Review Subcommittee Report.
7. Update on National Safe Boating Week 1991.
8. Report on European Economic Community.
9. Navigation Light Subcommittee Report.
10. Report of "Passengers for Consideration" Subcommittee.
11. Presentation on Accident Investigation Training and Accident Reconstruction.
12. Presentation on Automotive vs. Marine Components and Equipment.
13. Field Trip to Underwriters Laboratories' Test Facility.
14. Presentation on Marine Industry Boating Safety Initiatives.
15. Coast Guard Boating Safety Public Education Program Update.
16. Presentation on Recreational Boating Accident Data Collection Program.
17. Boating Standards and Product Assurance Update.
18. Coast Guard Search and Rescue Issues.
19. Reply to members' items.
20. Remarks by Chief, Office of Navigation Safety and Waterway Services.
21. Chairman's session.

Attendance is open to the interested public. With advance notice to the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present oral statements should so notify the Executive Director no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Mr. Albert J. Marmo, Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard, (G–NAB), Washington, DC 20593–0001, or by calling (202) 267–0997.

Dated: April 19, 1991.

J.W. Lockwood,

Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 91–9799 Filed 4–24–91; 8:45 am]

BILLING CODE 4910–14–M

Federal Aviation Administration

[Summary Notice No. PE–91–17]

Petitions for Exemption, Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before May 15, 1991.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (AGC-10), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

FOR FURTHER INFORMATION CONTACT: Miss Jean Casciano, Office of Rulemaking (ARM-1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-9683.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of part 11 of the Federal Aviation Regulations (14 CFR part 11).

Issued in Washington, DC, on April 18, 1991.

Denise Donohue Hall,

Manager, Program Management Staff, Office of the Chief Counsel.

Petitions for Exemption

Docket No.: 21882.
Petitioner: China Airlines, Limited.
Sections of the FAR Affected: 14 CFR 61.77 and 63.23.
Description of Relief Sought: To extend Exemption No. 4849, as amended, which allows the issuance of U.S. special-purpose pilot and flight engineer certificates to petitioner's airmen, without meeting the requirement that they hold a current foreign certificate or license issued by a foreign contracting State to the Convention on International Civil Aviation. Exemption No. 4849, as amended, will expire on September 30, 1991.

Docket No.: 26101.
Petitioner: American West Airlines, Inc.
Sections of the FAR Affected: 14 CFR 93.123(a).
Description of Relief Sought: To extend Exemption No. 5133A, which allows petitioner to operate four special slots at Washington National Airport that were formerly operated by Braniff under Exemption No. 3927.

Docket No.: 26302.
Petitioner: FlightSafety International.
Sections of the FAR Affected: 14 CFR 135.293 and 135.297.
Description of Relief Sought: To amend Conditions 3 and 4 of Exemption No. 5241 to allow the use of visual simulators.

Docket No.: 26388.
Petitioner: American Airlines.
Sections of the FAR Affected: 14 CFR 121.291 and appendix D of part 121.
Description of Relief Sought: To allow petitioner to initiate operation of an MD-11 airplane following a successful partial ditching demonstration.

Docket No.: 26523.
Petitioner: Lone Star Flight Museum.
Sections of the FAR Affected: 14 CFR 45.25 and 45.29.
Description of Relief Sought: To allow aircraft owned and operated by the petitioner, or its members, to operate with 2-inch markings in locations other than those locations provided in the regulations.

Docket No.: 26524.
Petitioner: Association of Air Medical Services/Helicopter Association International.
Sections of the FAR Affected: 14 CFR 43.3(a) and (g).
Description of Relief Sought: To allow properly trained personnel to exchange medical oxygen cylinders after such cylinders have been depleted.

Dispositions of Petitions

Docket No.: 25648.
Petitioner: Westair Commuter Airlines, Inc., dba United Express.
Sections of the FAR Affected: 14 CFR 121.371(a) and 121.378.
Description of Relief Sought/ Disposition: To extend Exemption No. 5027, which allows WestAir to use certain vendors that are original equipment manufacturers of the airframes, engines, and components of its British Aerospace BAe-146-200A aircraft in order to support the maintenance requirements of those aircraft. *Grant, March 29, 1991, Exemption No. 5027A.*

Docket No.: 26056
Petitioner: Accelerated Ground Training, Inc.
Sections of the FAR Affected: 14 CFR 61.56(b)(1); 61.57(c) and (d); 61.58(c)(1) and (d); 61.63(d)(2) and (d)(3); 61.67(d)(2); 61.157(d)(1) and (d)(2) and (e)(1) and (e)(2); part 61, appendix A; and part 121, appendix H.
Description of Relief Sought: To allow petitioner to use FAA-approved simulators to meet certain training and testing requirements. *Grant, April 3, 1990, Exemption No. 5169.*

Docket No.: 26356.
Petitioner: Allied-Signal Aerospace Company.
Sections of the FAR Affected: 14 CFR 21.325(b).
Description of Relief Sought/ Disposition: To allow the issuance of a U.S. export airworthiness approval for Gas Turbine Auxiliary Power Units (and parts for such power units) that are manufactured and produced in Germany under an extension of Garrett Auxiliary Power Division U.S. Technical Standard Order (TSO) C77a authorization. *Petition Withdrawn, March 5, 1991.*

Docket No.: 26400.
Petitioner: Air Transport Association of America.
Sections of the FAR Affected: 14 CFR 121.314 and 135.169(d).
Description of Relief Sought/ Disposition: To allow petitioner's members and other similarly situated parts 121 and 135 operators to install certain fire resistant materials in Class C and D cargo compartments over 200 cubic feet in volume after the March 20, 1991, compliance date. *Partial Grant, March 18, 1991, Exemption No. 5288.*

Docket No.: 26419.
Petitioner: DHL Airways, Inc.
Sections of the FAR Affected: 14 CFR 121.503.
Description of Relief Sought/ Disposition: To allow petitioner to permit pilots to complete their duty time schedules before being provided with at least 16 hours of rest. *Grant, April 10, 1991, Exemption No. 5296.*

Docket No.: 26431.
Petitioner: Regional Airline Association.
Sections of the FAR Affected: 14 CFR 121.314 and 135.169(d).
Description of Relief Sought/ Disposition: To allow continued operation of certain airplanes beyond the March 20, 1991, deadline for compliance with the flammability requirements for cargo and baggage compartment liners.

Docket No.: 26484.
Petitioner: AAR Aircraft Turbine Center, Inc.
Sections of the FAR Affected: 14 CFR 21.325(b)(3).
Description of Relief Sought/ Disposition: To allow airworthiness tags to be issued for Rolls Royce RB211 products that are located in, but were not manufactured in, the United States. *Petition Withdrawn, March 18, 1991.*

Docket No.: 23771.
Petitioner: Cessna Aircraft Company.
Sections of the FAR Affected: 14 CFR 91.9 and 91.531.
Description of Relief Sought/ Disposition: To extend Exemption No.

4050, as amended, which allows pilots who have experience, training, and other qualifications to operate Cessna Citation Models 550, S550, 552, and 560 without a second in command. *Grant, April 4, 1991, Exemption No. 4050F.*

[FR Doc. 91-9763 Filed 4-24-91; 8:45 am]
BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Office of the Secretary

[Department Circular—Public Debt Series—No. 12-91]

Treasury Notes of April 30, 1993, Series Z-1993

Washington, April 18, 1991.

1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of chapter 31 of title 31, United States Code, invites tenders for approximately $12,000,000,000 of United States securities, designated Treasury Notes of April 30, 1993, Series Z-1993 (CUSIP No. 912827 A5 1), hereafter referred to as Notes. The Notes will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the yield of each accepted bid. The interest rate on the Notes and the price equivalent of each accepted bid will be determined in the manner described below. Additional amounts of the Notes may be issued to Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities.

2. Description of Securities

2.1 The Notes will be dated April 30, 1991, and will accrue interest from that date, payable on a semiannual basis on October 31, 1991, and each subsequent 6 months on April 30 and October 31 through the date that the principal becomes payable. They will mature April 30, 1993, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2 The Notes are subject to all taxes imposed under the Internal Revenue Code of 1954. The Notes are exempt from all taxation now or hereafter imposed on the obligation or interest thereof by any State, any possession of the United States, or any local taxing authority, except as provided in 31 U.S.C. 3124.

2.3. The Notes will be acceptable to secure deposits of Federal public monies. They will not be acceptable in payment of Federal taxes.

2.4. The Notes will be issued only in book-entry form in a minimum amount of $5,000 and in multiples of that amount. They will not be issued in registered definitive or in bearer form.

2.5. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regulations governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the Treasury Direct Book-Entry Securities System in Department of the Treasury Circular, Public Debt Series, No. 2-86 (31 CFR part 357), apply to the Notes offered in this circular.

3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, DC 20239-1500, Wednesday, April 24, 1991, prior to 12 noon, Eastern Daylight Saving time, for noncompetitive tenders and prior to 1 p.m., Eastern Daylight Saving time, for competitive tenders. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Tuesday, April 23, 1991, and received no later than Tuesday, April 30, 1991.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is $5,000, and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. Noncompetitive tenders must show the term "noncompetitive" on the tender form in lieu of a specified yield.

3.3. A single bidder, as defined in Treasury's single bidder guidelines, shall not submit noncompetitive tenders totaling more than $1,000,000. A noncompetitive bidder may not have entered into an agreement, nor make an agreement to purchase or sell or otherwise dispose of any noncompetitive awards of this issue prior to the deadline for receipt of competitive tenders.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and are on the list of reporting dealers published by the Federal Reserve Bank of New York, may submit tenders for accounts of customers if the names of the customers and the amount for each customer are furnished. Others are permitted to submit tenders only for their own account.

3.5. Tenders for their own account will be received without deposit from commercial banks and other banking institutions; primary dealers, as defined above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; and Federal Reserve Banks. Tenders from all others must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.6. Immediately after the deadline for receipt of competitive tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yield will be prorated if necessary. After the determination is made as to which tenders are accepted, an interest rate will be established, at a ⅛ of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 99.500. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting noncompetitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to

provide a fair determination of the yield. Tenders received from Federal Reserve Banks will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders.

3.7. Competitive bidders will be advised of the acceptance of their bids. Those submitting noncompetitive tenders will be notified only if the tender is not accepted in full, or when the price at the average yield is over par.

4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of Notes specified in section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this Section is final.

5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in section 3.5. must be made or completed on or before Tuesday, April 30, 1991. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury notes or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Friday, April 26, 1991. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in Treasury Direct are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the note being purchased. In any such case, the tender form used to place the Notes allotted in Treasury Direct must be completed to show all the information required thereon, or the Treasury Direct account number previously obtained.

6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may, at any time, supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

Marcus W. Page,

Acting Fiscal Assistant Secretary.

[FR Doc. 91-9738 Filed 4-22-91; 12:17 pm]

BILLING CODE 4810-40-M

[Department Circular—Public Debt Series—No. 13-91]

Treasury Notes of April 30, 1996, Series N-1996

Washington, April 18, 1991.

1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of chapter 31 of title 31, United States Code, invites tenders for approximately $9,000,000,000 of United States securities, designated Treasury Notes of April 30, 1996, Series N-1996 (CUSIP No. 912827 A6 9), hereafter referred to as Notes. The Notes will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the yield of each accepted bid. The interest rate on the Notes and the price equivalent of each accepted bid will be determined in the manner described below. Additional amounts of the Notes may be issued to Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities.

2. Description of Securities

2.1. The Notes will be dated April 30, 1991, and will accrue interest from that date, payable on a semiannual basis on October 31, 1991, and each subsequent 6 months on April 30 and October 31 through the date that the principal becomes payable. They will mature April 30, 1996, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes are subject to all taxes imposed under the Internal Revenue Code of 1954. The Notes are exempt from all taxation now or hereafter imposed on the obligation or interest thereof by any State, any possession of the United States, or any local taxing authority, except as provided in 31 U.S.C. 3124.

2.3. The Notes will be acceptable to secure deposits of Federal public monies. They will not be acceptable in payment of Federal taxes.

2.4. The Notes will be issued only in book-entry form in a minimum amount of $1,000 and in multiples of that amount. They will not be issued in registered definitive or in bearer form.

2.5. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regulations governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the Treasury Direct Book-Entry Securities System in Department of the Treasury Circular, Public Debt Series, No. 2-86 (31 CFR part 357), apply to the Notes offered in this circular.

3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, DC 20239-1500, Thursday, April 25, 1991, prior to 12 noon, Eastern Daylight Saving time, for noncompetitive tenders and prior to 1 p.m., Eastern Daylight Saving time, for competitive tenders. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Wednesday, April 24, 1991, and received no later than Tuesday, April 30, 1991.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is $1,000, and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. Noncompetitive tenders must show the term "noncompetitive" on the tender form in lieu of a specific yield.

3.3. A single bidder, as defined in Treasury's single bidder guidelines, shall not submit noncompetitive tenders totaling more than $1,000,000. A noncompetitive bidder may not have entered into an agreement, nor make an agreement to purchase or sell or otherwise dispose of any noncompetitive awards of this issue prior to the deadline for receipt of competitive tenders.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and are on the list of reporting dealers published by the Federal Reserve Bank of New York, may submit tenders for accounts of customers if the names of the customers and the amount for each customer are furnished. Others are permitted to submit tenders only for their own account.

3.5. Tenders for their own account will be received without deposit from commercial banks and other banking institutions; primary dealers, as defined above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; and Federal Reserve Banks. Tenders from all others must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.6. Immediately after the deadline for receipt of competitive tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yield will be prorated if necessary. After the determination is made as to which tenders are accepted, an interest rate will be established, at a ⅛ of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 98.750. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting noncompetitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders received from Federal Reserve Banks will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders.

3.7. Competitive bidders will be advised of the acceptance of their bids. Those submitting noncompetitive tenders will be notified only if the tender is not accepted in full, or when the price at the average yield is over par.

4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of Notes specified in Section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this Section is final.

5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in section 3.5. must be made or completed on or before Tuesday, April 30, 1991. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury notes or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Friday, April 26, 1991. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in Treasury Direct are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the note being purchased. In any such case, the tender form used to place the Notes allotted in Treasury Direct must be completed to show all the information required thereon, or the Treasury Direct account number previously obtained.

6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may, at any time, supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

Marcus W. Page,

Acting Fiscal Assistant Secretary.

[FR Doc. 91-9739 Filed 4-22-91; 12:17 pm]

BILLING CODE 4810-40-M

Sunshine Act Meetings

Federal Register
Vol. 56, No. 80
Thursday, April 25, 1991

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, May 1, 1991.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: April 23, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91–9933 Filed 4–23–91; 2:40 pm]

BILLING CODE 6210–01–M

NATIONAL TRANSPORTATION SAFETY BOARD

TIME AND DATE: 9:30 a.m., Tuesday, April 30, 1991.

PLACE: Conference Rooms 8A, B, C, Eighth Floor, 800 Independence Avenue, SW., Washington, DC 20594.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Aviation Accident Report: Fuel Exhaustion of Avianca Flight 052, Boeing 707, Cove Neck, New York, January 25, 1990.

NEWS MEDIA CONTACT: Michael Benson, Telephone (202) 382–6607.

FOR MORE INFORMATION CONTACT: Bea Hardesty, (202) 382–6525.

Dated: April 19, 1991.

Bea Hardesty,

Federal Register Liaison Officer.

[FR Doc. 91–9818 Filed 4–23–91; 3:41 pm]

BILLING CODE 7533–01–M–M

NATIONAL WOMEN'S BUSINESS COUNCIL

TIME AND DATE: 9:30 a.m.–4:30 p.m., April 30, 1991.

PLACE: Arkansas State Capitol, Old Supreme Court Room, 2nd Floor South, Little Rock, Arkansas.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: In accordance with the Women's Business Ownership Act, Public Law 100–533 as amended, the National Women's Business Council announces a forthcoming hearing in Little Rock, Arkansas. Issues to be considered are data collection, access to capital, government contracts, international trade, and entrepreneurial education.

CONTACT PERSON FOR MORE INFORMATION: Helen W. Robbins, Executive Director, National Women's Business Council, 2100 Pennsylvania Avenue, NW., Suite 690, Washington, DC 20037, (202) 254–3850.

Helen W. Robbins,

Executive Director, National Women's Business Council.

[FR Doc. 91–9959 Filed 4–23–91; 3:24 pm]

BILLING CODE 6820–AB–M

SECURITIES AND EXCHANGE COMMISSION

Agency Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of April 29, 1991.

A closed meeting will be held on Tuesday, April 30, 1991, at 2:30 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Fleischman, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Tuesday, April 30, 1991, at 2:30 p.m., will be:

Institution of injunctive actions.
Institution of administrative proceedings of an enforcement nature.
Settlement of injunctive actions.
Settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Holly Smith at (202) 272–2100.

Dated: April 22, 1991.

Jonathan G. Katz,

Secretary.

[FR Doc. 91–9872 Filed 4–23–91; 2:29 pm]

BILLING CODE 8010–01–M

federal register

Thursday
April 25, 1991

Part II

Securities and Exchange Commission

17 CFR Part 240

Initiation or Resumption of Quotations Without Specified Information, Penny Stock Disclosure Rules, and Blank Check Offerings; Rule and Proposed Rules

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-29094; File No. S7-27-89]

RIN 3235-AA48

Initiation or Resumption of Quotations Without Specified Information

AGENCY: Securities and Exchange Commission.
ACTION: Final rule.

SUMMARY: The Commission is adopting amendments to Rule 15c2-11 under the Securities Exchange Act of 1934 ("Exchange Act"). Rule 15c2-11 governs the submission and publication of quotations by brokers or dealers for certain over-the-counter securities. The amendments expressly require a broker-dealer to review the information and documents specified in paragraph (a) of the Rule before publishing a quotation for such securities in a quotation medium, and to have a reasonable basis under the circumstances for believing that the information is accurate in all material respects and obtained from reliable sources. The amendments also require the broker-dealer to have in its records a copy of any trading suspension order, or Exchange Act release announcing a trading suspension, issued by the Commission respecting any of such an issuer's securities during the preceding twelve months, and require the broker-dealer to review the paragraph (a) information together with the information contained in the trading suspension orders or releases and any other material information concerning the issuer in the broker-dealer's knowledge or possession.

The Rule's information gathering requirements in paragraph (a) also are amended. If the issuer of a security that is required to file reports under the Exchange Act ("reporting issuer") has not filed its first annual report, a broker-dealer is required to have in its records a copy of the document subjecting the issuer to reporting obligations under the Exchange Act, together with any subsequently filed reports. Also, the amendments generally require a broker-dealer to obtain a copy of any current report filed with the Commission by a reporting issuer since its latest annual report.

In addition, the Commission is clarifying the period during which broker-dealers must retain the specified information, and amending the time by which broker-dealers must furnish certain information to the interdealer quotation system to commence quotations. Finally, the amendments clarify the exception for NASDAQ securities.

EFFECTIVE DATE: June 1, 1991.

FOR FURTHER INFORMATION CONTACT: Nancy J. Sanow or Jodie J. Kelley, Office of Trading Practices, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, telephone (202) 272-2848.

SUPPLEMENTARY INFORMATION:

I. Introduction and Summary of Amendments

The Securities and Exchange Commission has adopted amendments to Rule 15c2-11 ("Rule") [1] under the Securities Exchange Act of 1934 ("Exchange Act"), [2] which governs the publication and submission of quotations for certain over-the-counter securities in a quotation medium. [3] As a result of exceptions to its provisions, [4] the Rule applies to the initiation or resumption of quotations for securities traded in the non-NASDAQ market. [5] The Rule requires that brokers and dealers have specified information about a security covered by the Rule ("covered security") and its issuer before publishing quotations for that security.

In the past few years, the Commission has become increasingly concerned about instances of fraudulent and manipulative conduct involving transactions in low-priced securities, commonly referred to as "penny stocks," many of which are traded in the non-NASDAQ market. The Commission is actively addressing penny stock abuses through such measures as educational efforts, [6] regulatory initiatives, [7] enforcement actions, [8] and trading suspensions. [9] In this context, the Commission has focussed on the role of market makers in facilitating the trading of certain penny stocks where, for example, available information about the issuer suggests that a fraudulent or manipulative scheme may be present. Also, there have been a number of instances where broker-dealers, without regard to their obligations under Rule 15c2-11, resumed quotations for penny stocks that recently had been subject to Commission trading suspension orders. [10]

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[1] 17 CFR 240.15c2-11.

[2] 15 U.S.C. 78a *et seq.*

[3] See paragraph (e)(1) of the Rule, 17 CFR 240.15c2-11(e)(1).

[4] See, *e.g.*, paragraph (f)(1) (excluding over-the-counter quotations for exchange-listed securities), paragraph (f)(3) (the "piggyback" exception), and paragraph (f)(5) (excluding quotations for securities authorized for quotation in the NASDAQ system operated by the National Association of Securities Dealers, Inc. ("NASD")) of the Rule, 17 CFR 240.15c2-11(f)(1),(3), and (5).

[5] In this release, the term "non-NASDAQ market" means the market for those securities traded in the over-the-counter market which are neither exchange-listed nor quoted on NASDAQ; the term "non-NASDAQ securities" means those securities traded in the non-NASDAQ market.

Currently, the principal interdealer quotation media for non-NASDAQ securities are the National Daily Quotation Service (commonly referred to as the "pink sheets"), published and distributed by the National Quotation Bureau, Inc. and the OTC Bulletin Board Display Service ("OTC Service"), operated by the NASD. See Securities Exchange Act Release No. 27975A (May 30, 1990), 55 FR 23161 ("Release No. 34-27975A"). The OTC Service and the "pink sheets," as well as certain similar quotation media of a more limited geographic scope, such as Metro Data Company's "white sheets," reflect markets for securities of lesser-known issuers. These markets are generally characterized by low levels of trading activity and dealer competition. Information concerning these issuers often is not readily available to the marketplace, and few analysts regularly follow their securities.

[6] See "Beware of Penny Stock Fraud" (November 1988), SEC Press Release 88-111; "Penny Stock Telephone Fraud" (June 1989), SEC Press Release 89-58; and "New Penny Stock Cold Calling Rule" (December 1989), SEC Press Release 90-3.

[7] See Securities Exchange Act Release No. 29093 (April 17, 1991) (proposing penny stock disclosure rules); Securities Act Release No. 6891 (April 17, 1991) (proposing Rule 419 under the Securities Act of 1933); Securities Exchange Act Release No. 27160 (August 22, 1989), 54 FR 35468 (adopting Rule 15c2-6 under the Exchange Act, 17 CFR 240.15c2-6).

[8] See, *e.g.*, *SEC* v. *Brownstone-Smith Securities Corp.*, No. 89-6249-CIV-GONZALEZ (S.D. Fla. permanent injunction entered May 25, 1989), summarized in Litigation Release Nos. 12126 (June 12, 1989), 43 SEC Docket (CCH) 1748, and No. 12132 (June 16, 1989), 43 SEC Docket (CCH) 1841; *SEC* v. *Kimmes*, No. 89-C-5942 (N.D. Ill. permanent injunctions entered Sept. 13, 1989, Oct. 13, 1989, July 27, 1990, Sept. 13, 1990 and Oct. 2, 1990), summarized in Litigation Release Nos. 12210 (Aug. 9, 1989), 44 SEC Docket (CCH) 467, No. 12254 (Sept. 25, 1989), 44 SEC Docket (CCH) 1162, No. 12290 (Oct. 13, 1989), 44 SEC Docket (CCH) 1571, No. 12582 (Aug. 15, 1990), 46 SEC Docket (CCH) 1442, No. 12632 (Sept. 24, 1990), 47 SEC Docket (CCH) 270, and No. 12665 (Oct. 26, 1990), 47 SEC Docket (CCH) 829; *SEC* v. *Stoneridge Securities, Inc.*, No. CV-S-89-096 PMP (D. Nev. permanent injunctions entered Feb. 2 and March 1, 1989), summarized in Litigation Release Nos. 11995 (Feb. 13, 1989), 42 SEC Docket (CCH) 1260 and No. 12048 (March 29, 1989), 43 SEC Docket (CCH) 912.

[9] See, *e.g.*, *U.S. Assurance Corp.*, Securities Exchange Act Release No. 27354 (October 11, 1989), 44 SEC Docket (CCH) 1280; *Novaferon Labs, Inc.*, Securities Exchange Act Release No. 26797 (May 9, 1989), 43 SEC Docket (CCH) 1245; *Westminster Financial Corp.*, Securities Exchange Act Release No. 26791 (May 8, 1989), 43 SEC Docket (CCH) 1237. See also note 70 *infra*.

[10] See *Bagley Securities, Inc.*, Securities Exchange Act Release No. 27673 (February 5, 1990), 45 SEC Docket (CCH) 590; *William* v. *Frankel & Company*, Securities Exchange Act Release No. 27649 (January 26, 1990), 45 SEC Docket (CCH) 529; *Richfield Securities, Inc.*, Securities Exchange Act Release No. 26129 (September 29, 1988), 41 SEC Docket (CCH) 1235.

To further the goal of preventing fraudulent, deceptive, and manipulative practices in the market for non-NASDAQ securities, including penny stocks, the Commission proposed amendments to the Rule.[11] Specifically, the Commission proposed that broker-dealers be required to review the Rule's specified information; have a reasonable basis for believing that the information is true and correct and obtained from reliable sources; have in its records a copy of any trading suspension order, or Exchange Act release announcing a trading suspension, issued by the Commission with respect to any of the issuer's (or its predecessor's) securities during the previous twelve months; and review the Rule's required information in light of the information contained in that order or release.[12] The Commission also proposed amendments to expand the information gathering requirements of the Rule for reporting issuers; clarify the time period that a broker-dealer must retain the specified information; revise the time period by which a broker-dealer must furnish the necessary form to the interdealer quotation system to initiate or resume a quotation; and clarify the exception for NASDAQ securities. The Proposing Release also sought commenter's views on the Rule's "piggyback" exception.[13] While the amendments were developed in the context of the Commission's concerns regarding penny stocks, the Rule and the present amendments are addressed to the fraudulent and manipulative potential that exists when a broker or dealer submits quotations concerning any non-NASDAQ security in the absence of certain information.[14]

Sixteen comment letters were received in response to the Proposing Release.[15] Commenters generally supported the Commission's efforts to prevent penny stock fraud. Commenters did not object to the requirements that market makers have specified information about a security and its issuer, and review that information, before publishing quotations. Most commenters, however, were concerned about the proposed standard for that review, *i.e.*, that the broker-dealer have a "reasonable basis for believing that the information is true and correct in relation to the date that the quotation is submitted," as they understood that standard. Commenters believed that this proposed amendment represented a significant and burdensome change in a broker-dealer's obligations and might cause a number of broker-dealers to cease making a market for non-NASDAQ securities, thereby impairing the liquidity of these stocks. Commenters favored the proposal to include trading suspension orders among the Rule's information requirements. However, they were divided on the proposed standard for review of the Rule's required information following expiration of a suspension order. After carefully considering the views of the commenters, the Commission has adopted the amendments with certain modifications.

II. Amendments

A. The Rule's Review Requirements

1. Paragraph (a) Introductory Text

a. The Commission proposed to clarify and enhance the degree of scrutiny that a broker-dealer must give to the required information prior to publishing a quotation. The Rule contained a "double negative" standard regarding the broker-dealer's belief as to the accuracy of the information, *i.e.*, the broker-dealer was required to have "no reasonable basis for believing (that the information) is not true and correct."[16] However, the Rule included an affirmative standard regarding the reliability of the source of the information, *i.e.*, the information had to be "obtained by the [broker-dealer] from sources which he has a reasonable basis for believing are reliable." The double negative language was susceptible to varying interpretation, especially when juxtaposed with the affirmative standard regarding the reliability of the information's source.

As the Commission has noted, the information gathering requirements of the Rule were designed to require the broker-dealer "to give some measure of attention to financial and other information about the issuer of a security before it commences trading in that security."[17] However, the Rule is precise as to the information the broker-dealer must obtain, but was ambiguous as to the relationship between the Rule's information gathering requirements and the obligations of the broker-dealer to review its contents. Thus, the Rule did not expressly require a broker-dealer to review the information in its records prior to entering a quotation for a non-NASDAQ security. Nevertheless, inherent in the prior requirements of paragraph (a)[18] was the obligation that the broker-dealer, at a minimum, inspect the documents to verify that it had received all of the required information and knew the sources of that information. Beyond that basic level, however, the nature of the broker-dealer's review obligations may have been uncertain, for example, where a broker-dealer, in addition to the information required by paragraph (a), also had knowledge or possession of material adverse information regarding the issuer prior to its publication or submission of a quotation. A firm might have argued that it had no duty to incorporate this additional information in the review process, and that this other information was only required to be documented and preserved in the broker-dealer's records by former paragraph (c) of the Rule.[19]

Although the comments generally indicated that some measure of review is appropriate, the substantial majority of commenters stated that the proposed paragraph (a) amendment would not simply clarify the required level of review, but would unduly expand the burdens, responsibilities, and liabilities of a broker-dealer. Many of these commenters believed that the amendments would impose on market makers a "due diligence" standard similar to that imposed on underwriters in a public offering of securities. Some commenters noted that, unlike an underwriter in a securities offering,

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[11] See Securities Exchange Act Release No. 27247 (September 14, 1989), 54 FR 39194 ("Proposing Release").

[12] The Proposing Release also set forth the Commission's interpretive position regarding a broker-dealer's obligations under the Rule following the expiration of a trading suspension. See Proposing Release, 54 FR at 39197–39198.

[13] See paragraph (f)(3) of the Rule, 17 CFR 240.15c2–11(f)(3). The "piggyback" exception is the subject of a companion release issued today by the Commission. See Section III infra.

[14] See Release 34–9310, 36 FR at 18641.

[15] Copies of these letters, as well as a Summary of Comments prepared by the staff, are contained in File No. S7–27–89 and are available for public inspection and copying at the Commission's Public Reference Room.

[16] See former paragraphs (a)(4) and (a)(5) of the Rule.

[17] See Securities Exchange Act Release No. 21470 (November 15, 1984), 49 FR 45117, 45118 ("Release 34–21470").

[18] That is, with respect to the items of information to be obtained and maintained by broker-dealers and with respect to the reliability of their sources of that information.

[19] 17 CFR 240.15c2–11(c) (1990). As discussed *infra*, the Commission has restructured former paragraph (b) of the Rule, 17 CFR 240.15c2–11(b) (1990), and former paragraph (c) to simplify the Rule's structure and to reflect the amendments to the Rule. The content of former paragraph (b) is unchanged. Former paragraph (c) provided in part that "broker-dealer shall maintain in writing as part of his records * * * any other information (including adverse information) regarding the issuer which comes to his knowledge or possession before the publication or submission of the quotation * * *."

market makers do not have a sufficiently substantial relationship with the issuer of the quoted security to permit them to undertake meaningful investigative activities. Even if the broker-dealer were to employ independent counsel or accountants, commenters noted that issuers would be reluctant to grant them access to their books and records. One commenter, the NASD, supported the requirements that the broker-dealer review the Rule's specified information and have a reasonable basis for believing that the information was obtained from a reliable source. The NASD, however, opposed adoption of the requirement that the broker-dealer have a reasonable basis for believing that the information is accurate "in relation to the day the quotation is submitted," because it believed that any such requirement would necessitate the performance of a merit-type review, including independent verification of the issuer's financial statements.

A substantial majority of commenters also suggested that a distinction be made between wholesale market makers [20] and retail firms.[21] Some commenters pointed out that wholesale market makers often ignore fundamentals (i.e., basic information about the issuer) and trade on the basis of perceived supply and demand of the quoted security. They believed that any heightened standard of review might force some market makers, particularly wholesalers, to cease making a market and thus would impair the liquidity of the marketplace. Several commenters maintained that any heightened standard of review is more appropriate for retail broker-dealers, who must satisfy suitability and other requirements when recommending a security to a customer.[22]

b. The Commission believes that many of the commenters misapprehend the nature and potential impact of the amendments to paragraph (a). Accordingly, the Commission has revised the proposed provisions to help clarify its intentions in this regard. By including an express review requirement and substituting an affirmative "reasonable basis" standard for the double negative language, the amendments refine the duties of the broker-dealer and thus further the underlying objectives of the Rule. In addition, by incorporating the review and reasonable basis requirements in the introductory portion of paragraph (a), the amendments make it clear that these requirements attach to all information required by that paragraph. As amended, paragraph (a) of the Rule prohibits a broker-dealer from publishing or submitting a quotation for a covered security unless it has reviewed the information specified in subparagraphs (a)(1) through (a)(5) ("paragraph (a) information") together with the information required by paragraph (b) as amended today ("paragraph (b) information"), and based upon such review has a reasonable basis under the circumstances [23] for believing that the required information is accurate [24] in all material respects and that the information was obtained from reliable sources.[25]

The Commission contemplates that the review will be performed in accordance with the following basic principles.

Source reliability. As an initial step, the broker-dealer should satisfy itself that it has a reasonable basis for believing that any source of the paragraph (a) information is reliable. This "reasonable belief" standard was required pursuant to subparagraph (a)(5) under the prior formulation of the Rule and is not altered by today's amendments, except that it now applies to subparagraphs (a)(1) through (a)(5). In the absence of any "red flag" (*i.e.*, information that under the circumstances reasonably indicates that the source is unreliable), a broker-dealer would be able to satisfy the Rule's requirements regarding the reliability of the information's source, if that information was provided by the issuer of the securities or its agents, including its officers and directors, attorney, or accountant, or was obtained from an independent information service, such as the Commission's Public Reference Room, a document retrieval service, or standard research sources (*e.g.*, Standard & Poor's *Standard Corporation Descriptions*).

Occasionally, a broker-dealer may receive Rule 15c2–11 information about an issuer from another market maker or from someone other than the issuer or its agents or an independent information service. In these situations, while the broker-dealer might be aware of the identity of the immediate source of the specified information, it might not have any knowledge about the person that actually prepared the Rule 15c2–11 information. To satisfy the Rule's requirements regarding source reliability, the broker-dealer would have to ascertain the reliability of the preparer of the Rule 15c2–11 information. Where the broker-dealer is informed by the immediate source that the issuer has prepared or approved the Rule's specified information, a broker-dealer should generally verify that representation by contacting the issuer directly. Where the broker-dealer receives the information, however, from an independent and objective source, such as a bank but not a market maker in the security, which represents that it prepared the information or received the information directly from the issuer, the broker-dealer typically may rely on that representation as to the source. Additionally, when a "red flag" regarding the source's reliability exists, the broker-dealer would have to conduct the inquiry called for by the circumstances to reasonably determine

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[20] A market maker is defined in section 3(a)(38) of the Exchange Act as "any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis." 15 U.S.C. 78c(a)(38). A wholesale market maker holds himself out primarily to other broker-dealers and professionals as being willing to buy and sell securities. See generally Report of Special Study of the Securities Markets of the Securities and Exchange Commission, reprinted in H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2 at 554–555 (1963) ("Special Study").

[21] A retail firm engages in purchasing and selling securities with public investors, generally involving direct solicitation of buy and sell interest. In essence, the commenters suggest that the Rule should apply only to "integrated" firms, *i.e.*, broker-dealers that act as market makers and transact business with the public. See generally Special Study, pt. 2, 554–555.

[22] Under the general antifraud provisions of the federal securities laws, a broker-dealer that recommends securities to its customers, *i.e.*, a retail firm, is required to have a reasonable basis for those recommendations. See *Hanly* v. *SEC*, 415 F.2d 589 (2d Cir. 1969), *affirming Richard J. Buck & Co.*, 43 S.E.C. 998 (1968).

[23] The phrase "under the circumstances" relates to the circumstances surrounding the broker-dealer's formation of a reasonable belief that the information is accurate, and not to the particular circumstances of the broker-dealer publishing or submitting quotations for a covered security. For example, a market maker who customarily trades solely on the basis of perceived supply and demand (*i.e.*, trades "by the numbers"), or who lacks the personnel to conduct a reasonable review, could not avoid its obligations under Rule 15c2–11 by asserting that under its circumstances, it was not required to obtain and review the Rule's specified information and have a reasonable basis for believing in the accuracy of the information and the reliability of the source of the information.

[24] Solely for clarity and conciseness, the Commission is replacing the phrase "true and correct" with the word "accurate."

[25] In response to a commenter's recommendation, amended paragraph (a) combines the separate review requirements contained in the Rule as proposed to be amended. Specifically, paragraph (a) incorporates proposed paragraph (h), which pertained to the information review obligations of a broker-dealer publishing or submitting a quotation for a security of an issuer that had been the subject of a trading suspension order issued by the Commission during the twelve months preceding publication or submission of the quotation. See section II.A.2. *infra*.

whether the information's source is reliable.[26]

Document review. Once the broker-dealer has a reasonable belief as to the source's reliability, it should examine the materials in its records to make certain that all of the required information has been obtained. Paragraph (a) as amended requires this review process for the information required by each of its subparagraphs. For the particular subparagraph on which the broker-dealer is relying to publish quotations, the broker-dealer should review the categories of information listed in subparagraph (a)(5).[27] Next, the broker-dealer should review the paragraph (a) information in the context of all other information about the issuer in its knowledge or possession, *i.e.*, paragraph (b) information.[28] Ordinarily, the broker-dealer need not take any further steps, *e.g.*, there would be no requirement to look behind the financial statements or any other information required to be obtained.[29] However, in its review, the broker-dealer must be alert to any "red flags" (*i.e.*, information under the circumstances that reasonably indicates that one or more of the required items of information is materially inaccurate).[30] "Red flags" would be indicated, for example, by material inconsistencies in the paragraph (a) information, or material inconsistencies between that information and other information in the broker-dealer's knowledge or possession.[31] Examples of "red flags" would include a qualified auditor's opinion resulting from management's failure to provide all of the information relevant to prepare the financial statements, or financial statements of a development stage issuer that lists as the principal component of its net worth an asset wholly unrelated to the issuer's lines of business. Warning signs such as these may call into question the accuracy of the information to be relied upon by a broker-dealer to satisfy the Rule's requirements.

Where no "red flags" appear during this review process, the broker-dealer would have a reasonable basis for believing that the information is accurate. However, if "red flags" appear at any stage of the review process, the broker-dealer may not publish quotations unless and until those "red flags" are reasonably addressed. The broker-dealer's specific efforts to satisfy itself with respect to the accuracy of the information will vary with the circumstances, and may require the broker-dealer to obtain additional information or seek to verify existing information.[32] For example, the broker-dealer may reasonably believe that the information is accurate after questioning the issuer directly. When information from the issuer is not adequate, or raises reasonable doubts on the part of the broker-dealer, the broker-dealer may wish to consult independent sources, *e.g.*, an attorney or accountant.[33]

The Rule requires that a market maker have a reasonable basis under the circumstances for believing that paragraph (a) information, in light of any other documents and information required by paragraph (b), is accurate in all material respects. If the market maker is aware that information required under paragraph (a) is inaccurate, it may nevertheless submit quotations without violating the Rule, as long as it is able to supplement the paragraph (a) information with additional information that it believes is accurate. Thus, for example, a market maker who is aware that information required pursuant to paragraph (a) is inaccurate could simply produce a written record reflecting the supplemental, accurate information that would then be maintained pursuant to paragraph (b). Similarly, the paragraph (a) information, coupled with, *e.g.*, more recent Forms 8–K, or press releases maintained pursuant to paragraph (b)(3), would permit the market maker to satisfy the Rule's requirement.

There are important differences between the obligations imposed by the Rule upon broker-dealers publishing quotations and the obligations of an underwriter. Because of its special relationship with the issuer, other distribution participants, and the investing public, an underwriter is subject to a largely separate, broad set of investigative responsibilities (commonly referred to as "due diligence" responsibilities) under both the securities laws and the standards of the profession.[34] In contrast, the revised requirements of the Rule do not contemplate that, before submitting or publishing quotations for a covered security, a market maker must routinely conduct any independent "due diligence" investigation concerning the

[26] See, e.g., Section II.A.2. *infra.*

[27] With respect to registration statements that incorporate other documents by reference, *e.g.*, Form S–3 under the Securities Act of 1933 ("Securities Act"), 17 CFR 239.13, the broker-dealer may be required to obtain some of the incorporated documents in order to satisfy the information gathering and review requirements. For example, where the registration statement required by paragraph (a)(1) incorporates another document containing a description of "the nature of the issuer's business" (see paragraph (a)(5)(x)) or "the name of the chief executive officer and members of the board of directors" (see paragraph (a)(5)(xi)), the broker-dealer would have to obtain that other document.

[28] The Commission has amended paragraph (b) to require the broker-dealer to maintain as part of its written records any other material information about the issuer, including adverse information, that comes to its knowledge or possession that would be considered important in determining whether there is a reasonable basis for believing in the accuracy (and the reliability of the source) of the paragraph (a) information. However, paragraph (b) does not require the broker-dealer to maintain trivial information or information from an uncertain source. Also, paragraph (b) does not require a broker-dealer routinely to affirmatively seek additional information about the issuer. However, if material information about the issuer comes to the broker-dealer's knowledge or possession (orally or in writing) from an authoritative source, the broker-dealer must include that information in its files (*i.e.*, documents should be retained, and oral information should be recorded and maintained).

[29] Because of the liabilities attaching to documents filed with the Commission, see, *e.g.*, sections 11 and 24 of the Securities Act, 15 U.S.C. 77k and 77x, and sections 18 and 32 of the Exchange Act, 15 U.S.C. 78r and 78ff, a broker-dealer generally could reasonably have stronger belief as to the accuracy of information contained in such documents than information in documents not so filed. Of course, the presence of "red flags," as discussed herein, must be considered in the review of any information.

[30] Moreover, the presence of "red flags" can alert the broker-dealer that fraudulent or manipulative activities are taking place in the market for the security. See *Bunker Securities Corporation*, 48 S.E.C. 859, 865 (1987).

[31] As suggested by a commenter, the phrase "in all material respects" has been added to paragraph (a). Consistent with the prior operation of the Rule, broker-dealers may have a reasonable basis for believing that the paragraph (a) information is accurate despite the presence of insignificant errors or discrepancies in the information. *Cf. Basic Inc.* versus *Levinson*, 108 S.Ct. 978, 983 (1988).

[32] *Cf. Bunker Securities Corporation*, 48 S.E.C. 859, 865 (1987).

[33] Pursuant to recent amendments to Schedule H of the NASD By-Laws, prior to initiating or resuming quotations, NASD member firms are required to provide the NASD with a copy of the paragraph (a) information. See Section II.C. *infra.* The NASD reviews the furnished information before a member firm may publish the quotation. This NASD review does not alter a broker-dealer's obligations to have a reasonable belief as to the accuracy of the information and the reliability of its source, *i.e.*, a broker-dealer may not claim to have any such reasonable belief on the basis that the NASD reviewed the Rule 15c2–11 information and did not raise any objection to such information prior to the broker-dealer's publication of the quotation. *Cf. Melvin Y. Zucker*, 46 S.E.C. 731, 733 (1976).

[34] See, *e.g.*, Securities Act Release No. 5275 (July 26, 1972), 37 FR 16011 ("The Obligations of Underwriters, Brokers and Dealers in Distributing and Trading Securities, Particularly of New High Risk Ventures"), and Securities Exchange Act Release No. 26100 (September 22, 1988), 53 FR 37778 (providing the Commission's interpretation of underwriter responsibilities under the antifraud provisions of the securities laws, with particular reference to offerings of municipal securities) and cases cited therein. See also Klinges, "Expanding the Liability of Managing Underwriters Under the Securities Act of 1933," 53 Fordham L. Rev. 1063 (1985); NASD, *Due Diligence Seminars: Special Report* (1981).

issuer or its business operations and financial condition such as the investigation expected to be conducted by an underwriter. [35] A market maker publishing quotations for a non-NASDAQ security may have no relationship with the issuer of the security. The Rule does not demand that the market maker develop such a relationship in order to obtain information about the issuer. Rather, as described above, the Rule specifies the information that must be gathered, and the Rule's requirements are satisfied if the market maker has a reasonable basis for believing that the information is accurate and obtained from a reliable source, after reviewing that information. In short, a reasonable basis for belief in the accuracy of the information can be founded solely on a careful review of the paragraph (a) information together with paragraph (b) information, provided that the paragraph (a) information was obtained from sources reasonably believed to be reliable and there are no "red flags." When "red flags" are initially present, the broker-dealer may upon inquiry obtain additional information that provides a reasonable basis for believing that the information is accurate.

In brief, although the amendments make the review requirement explicit, the Commission believes that the review procedures necessary to comply with amended paragraph (a) will not begin to approach the depth and breadth of an underwriter's due diligence investigation. In light of these considerations, the Commission views the dangers to market efficiency suggested by commenters that could result from the adoption of the amendments as unlikely to arise.

c. After considering the comments, the Commission believes that the proposed inclusion of the requirement that the broker-dealer have a reasonable basis for believing that the information is accurate "in relation to the day that the quotation is submitted" may have suggested a more extensive level of review than was intended. The proposed phrase was designed to require the broker-dealer to incorporate the information formerly required by paragraph (c), which will often be more current than the paragraph (a) information, into the review process. [36] As described above, paragraph (a) does not require the broker-dealer to question any information unless the information contains apparent material discrepancies, or other material information in the broker-dealer's knowledge or possession (*i.e.*, paragraph (b) information) reasonably indicates that the paragraph (a) information is materially inaccurate. Accordingly, the proposed phrase has been deleted.

d. With respect to the comments discussing the respective market roles of retail firms and wholesale firms, the Commission does not agree with those commenters who suggested that the concerns set out in the Proposing Release would more properly be addressed by adopting or raising standards only as to retail firms. The Rule is directed at the fraudulent, deceptive, or manipulative potential of a broker-dealer's quotations, [37] and does not focus on whether the broker-dealer also engages in retail activity. [38] The securities laws already distinguish between retail and wholesale firms by placing fiduciary and other obligations on retail firms because they deal with the public. [39]

Some securities traders have stated that in setting a price for a security they rely on their "feel" for the market in the security. [40] While such market information is undoubtedly important in establishing quotations, in situations where the Rule applies, a broker-dealer must nevertheless review the required information before publishing a quotation. Accordingly, a claim to be trading solely "by the numbers" [41] will not excuse a failure to comply with the Rule's requirements, or support an argument that the Rule's information requirements are not relevant or "material" to the publication of quotations. [42]

The Commission reaffirms its view that the Rule provides a necessary and appropriate means to prevent fraudulent, deceptive, and manipulative quotations by any broker or dealer. [43]

2. Review Following a Trading Suspension

The Commission proposed adding paragraph (h) to the Rule, which would have pertained specifically to a broker-dealer's obligation to review information in its files prior to publishing or submitting a quotation for the security of an issuer that had been the subject of a trading suspension order issued by the Commission during the preceding twelve months. [44] Proposed paragraph (h) would not have imposed standards of review different from those envisioned by amended paragraph (a), but the problem of post-suspension market making was of sufficient concern that the Commission thought that it would be appropriate to treat it separately in the Rule. As discussed above, the Commission is simplifying the Rule by incorporating the requirements of proposed paragraph (h) into revised paragraph (a).

Commenters were divided on whether the Commission should adopt proposed paragraph (h). Six commenters opposed the amendment, particularly because they believed it would unfairly delegate to broker-dealers the task of verifying the accuracy of available information about an issuer following a trading suspension. On the other hand, six commenters generally supported the need for broker-dealers to review available information when entering quotations after expiration of a trading suspension for the issuer's securities.

The Commission recently has concluded enforcement actions involving two broker-dealers, who, following the expiration of a trading suspension covering 46 issuers, published quotations for a number of those issuers' securities without complying with the requirements of Rule 15c2–11. [45] In ordering the trading

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[35] It should be noted that a possible source of confusion in this area is the fact that the material gathered to satisfy the requirements of Rule 15c2–11 often is referred to as a "due diligence file." The Commission believes that this is a misnomer.

[36] See Proposing Release, 54 FR at 39199.

[37] *Cf.* Special Study, pt. 2, at 605–609; *Halsey, Stuart & Co., Inc.*, 30 S.E.C. 106, 126–129 (1949).

[38] See Proposing Release, 54 FR at 39196.

[39] See *id.* at 39197; NASD Rules of Fair Practice Article III, section 2, NASD Guide (CCH) ¶ 2152.

[40] See, *e.g.*, Special Study, pt. 2, at 569.

[41] See Proposing Release, 54 FR at 39202.

[42] The addition of the phrase "in all material respects" to paragraph (a) of the Rule, see note 31 *supra*, does not alter any broker-dealer's obligation to gather and review the required information.

[43] Rule 15c2–11 was adopted under Section 15(c)(2) of the Exchange Act, 15 U.S.C. 78*o*(c)(2), among other sections. Section 15(c)(2) provides the Commission with broad authority to promulgate rules that prescribe means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices in the over-the-counter securities markets. The Commission is amending paragraph (a) to reflect that it has employed its full authority under section 15(c)(2).

[44] The Commission is authorized under section 12(k) of the Exchange Act, 15 U.S.C. 78*l*(k), to suspend summarily trading in any security, other than an exempted security, for a period not exceeding 10 days. The Commission may issue such an order if in its opinion the public interest and the protection of investors so require.

The situation in which broker-dealers may be precluded from publishing quotations for a security because they lack the information required by the Rule should be distinguished from a trading suspension in the security. See Proposing Release, 54 FR at 39198 n.51.

[45] See *Bagley Securities, Inc.* and *William V. Frankel & Company*, note 10 *supra* (firms consented to findings without admitting or denying the allegations contained therein).

[46] 15 U.S.C. 77a *et seq.*

suspensions, the Commission cited possible false statements by the issuers concerning the issuers' corporate history, stock ownership, financial condition, and claims for exemption from the registration provisions of the Securities Act [46] pursuant to which the issuers' securities were trading. Prior to submitting quotations for four of those issuers' securities, one broker-dealer failed either to obtain any new information concerning the issuers, or to determine the accuracy and completeness of the information it already had in its files about those issuers.[47] Thus, the concerns raised in the Commission's suspension order were either ignored or disregarded. Although both broker-dealers had obtained new information for a number of the issuers after the suspensions expired, they failed to examine the new information before resuming quotations for the securities of those issuers to determine whether the new information addressed the concerns raised in the suspension order.[48]

These cases highlight the fact that a trading suspension should alert a broker-dealer to the possibility that information in its possession concerning the issuer may no longer be accurate. The cases also underscore the requirement that a broker-dealer review the Rule's required information in light of the information contained in a trading suspension order, and, if necessary, obtain updated information.

In this context, the broker-dealer should, at a minimum, receive assurances or additional information with respect to matters cited in the suspension order or with respect to other matters affecting the broker-dealer's reasonable belief as to the accuracy of the information. Reliance on new information or assurances from prior sources of information in these circumstances, however, requires caution.[49] In exceptional cases, where the source (typically, the issuer or its agents) is unable to provide reasonable assurances about the reliability of the information, consultation with an independent accountant or attorney may be warranted.

The Commission does not agree that it is impermissibly delegating its enforcement responsibilities to broker-dealers, who, commenters asserted, are in no better position than the Commission to determine after a trading suspension whether or not available issuer information is accurate. As the Commission observed in the Proposing Release, the factors cited in its order as the basis for the trading suspension do not constitute an adjudication of fact or law with respect to those matters.[50] It is necessary and appropriate that a broker-dealer consider the Commission's concerns regarding the trading of an issuer's securities when the broker-dealer reviews the paragraph (a) information to determine whether it has a reasonable basis for believing that the information is accurate and the source is reliable.

In sum, the Commission believes that requiring review of paragraph (a) information together with the information contained in a trading suspension order will not result in any appreciable change in the application of the Rule. Rather, the Commission views amended paragraphs (a) and (b) (incorporating the requirements of proposed paragraph (h)) as explicitly setting forth a broker-dealer's previously implicit obligations following a trading suspension.

B. Revisions to the Rule's Information Gathering Requirements

1. Paragraph (a)(3)

Paragraphs (a)(1) through (a)(5) of the Rule [51] specify the information that a broker-dealer must have before publishing a quotation for a covered security. Prior to the adoption of today's amendment, paragraph (a)(3)(iii) required a broker or dealer submitting quotations for a security of an issuer required to file reports under Sections 13 or 15(d) of the Exchange Act ("reporting issuer") to have in its records the issuer's most recent annual report [52] together with any other reports required to be filed at regular intervals thereafter, *i.e.*, quarterly reports on Form 10–Q [53] under the Exchange Act.[54] The Commission has amended paragraph (a)(3) in two respects.

a. *Reporting Issuer That Has Not Filed Its First Annual Report.* Although every reporting issuer has a continuing obligation to file detailed information with the Commission, a broker-dealer seeking to publish quotations for a reporting issuer could not comply with the terms of paragraph (a)(3) until the issuer filed its first annual report. Therefore, the broker-dealer had to look to the less comprehensive information requirements of paragraph (a)(5) of the Rule.[55] Under the amendment adopted today, if a reporting issuer has not filed its first annual report, the broker-dealer may satisfy paragraph (a)(3) by having in its records the prospectus included in the registration statement that caused the issuer to become a reporting company,[56] or the Form 10,[57] which was filed and became effective, together with any subsequent reports filed with the Commission by the issuer.[58] The three commenters that addressed this issue favored this revision to paragraph (a)(3). One commenter suggested that the amendment as proposed be reworded to parallel paragraph (a)(1), which permits broker-dealers to retain the prospectus specified by section 10(a) of the Securities Act rather than the entire registration statement as had been proposed. The Commission has incorporated this suggestion into the amendment as adopted.

b. *Current Reports.* Paragraph (a)(3) also is amended to require broker-dealers publishing or submitting quotations for reporting issuers to have in their records copies of any current reports filed with the Commission on Form 8–K [59] since the issuer's latest annual report.

Six commenters opposed the amendment. Some commenters suggested that, unless the broker-dealer has a substantial relationship with the issuer or engages a private search service, the broker-dealer would not know whether the issuer had filed a Form 8–K. One commenter, the NASD, supported the amendment, adding that the broker-dealer should have all current reports filed as of one business day prior to submitting the quotation.

The Commission is adopting this amendment because the events triggering the Form 8–K filing

[47] See *William V. Frankel & Company*, note 10 *supra*.

[48] See *Bagley Securities Inc.* and *William V. Frankel & Company*, note 10 *supra*.

[49] Cf. Securities Act Release No. 5128 (July 7, 1971), 3 Fed. Sec. L. Rep. (CCH) ¶ 22,760.

[50] 54 FR at 39198.

[51] 17 CFR 240.15c2–11(a)(1)–(a)(5).

[52] See 17 CFR 249.310.

[53] See 17 CFR 249.308a.

[54] In the event the issuer should change its fiscal year, the broker-dealer must also obtain and review any transitional reports filed with the Commission pursuant to Rule 15d–10 under the Exchange Act, 17 CFR 240.15d–10.

[55] 17 CFR 240.15c2–11(a)(5). Paragraph (a)(5) specifies the information, including financial information, that a broker-dealer must have in its records before initiating or resuming a quotation for a covered security that does not fall within the other provisions of paragraph (a).

[56] Paragraph (a)(1) of the Rule permits a broker-dealer to initiate or resume quotations based on a registration statement that became effective less than 90 days before publication or submission of the quotation. Under amended paragraph (a)(3), the broker-dealer could enter quotations based on a registration statement during the period between 90 days after effectiveness of the registration statement and the filing of the first annual report.

[57] 17 CFR 249.210.

[58] This would include quarterly reports and current reports. See Section II.B.1.b *infra*.

[59] 17 CFR 249.308.

requirements generally involve material events affecting the issuer.[60] Market makers for non-NASDAQ securities should be aware of these material events when initiating or resuming quotations for the issuer's securities. A broker-dealer has several means of obtaining information regarding, or copies of, current reports on a timely basis.[61] The Commission is not persuaded that the burden of obtaining current reports outweighs the benefit of the amendment, namely that market makers will have the most current information available when establishing quotations for non-NASDAQ securities.[62]

Unlike annual and quarterly reports, however, current reports are not filed at regular intervals. In the Proposing Release, the Commission recognized that it may be difficult for a broker-dealer to determine contemporaneously with its quotation submission whether an issuer had filed a current report with the Commission. To alleviate this potential problem, the Proposing Release stated that a broker-dealer would be deemed in compliance with paragraph (a)(3) if the broker-dealer obtains all Forms 8–K filed with the Commission by the issuer as of a date reasonably in advance of the date of submission of the quotation to the quotation medium. The Commission noted in the Proposing Release that a period of up to five business days is reasonable.

The Commission is modifying this interpretive position to account for a recent amendment to Schedule H of the NASD By-Laws, which requires a broker-dealer to submit Rule 15c2–11 information to the NASD at least three days prior to the publication or submission of a quotation for a non-NASDAQ security.[63] Moreover, as suggested by some commenters, the position has been incorporated in the Rule as adopted. Under paragraph (d)(2)(i), broker-dealers need obtain only those Forms 8–K filed by the issuer as of a date that is up to five business days prior to the earlier of the broker-dealer's submission of the quotation to the quotation medium or submission to the NASD of the information required by Schedule H.[64] This amendment should alleviate the problem of the unpredictability of the filing of Forms 8–K, and eliminate a potential timing problem under the amendment as proposed.

The Commission understands that market makers often are included on an issuer's mailing list, and regularly receive documents publicly disseminated by the issuer. In the Commission's view, a broker-dealer that has made arrangements to receive all of the issuer's reports when they are filed, and the broker-dealer regularly has received the issuer's filed reports on a timely basis over a reasonable period of time (*e.g.*, six months) may reasonably assume that it has satisfied and continues to satisfy the information gathering requirements of amended paragraph (a)(3), unless the broker-dealer has reason to believe that the issuer has failed to file a required report or has filed a report but has not sent it to the broker-dealer. The Commission has incorporated this position in paragraph (d)(2)(ii). In determining whether it receives current reports on a timely basis, a broker-dealer may compare the dates of the reports and the date of the broker-dealer's receipt of those forms. If the broker-dealer receives the reports shortly after their filing, it would be reasonable to assume that they are being received on a timely basis.

One commenter requested clarification concerning whether a broker-dealer would be precluded from publishing a quotation for a reporting issuer, if it had a reasonable basis to believe that the issuer was delinquent in filing its annual, quarterly, or current reports. When paragraph (a)(3) information is not reasonably available,[65] *e.g.*, because the issuer is delinquent in its filing obligations, the broker-dealer may substitute the information specified by paragraph (a)(5) in order to publish or submit quotations.[66] If the paragraph (a)(5) information is unavailable, the broker-dealer may not publish or submit a quotation, unless an exception to the Rule is applicable.

2. Proposed Paragraph (a)(6)

The Commission proposed to add paragraph (a)(6) to the Rule, which would have required a broker-dealer initiating or resuming quotations to have in its records a copy of any trading suspension order, or Exchange Act release announcing that trading suspension, issued by the Commission respecting any securities of the issuer (or its predecessor) during the preceding twelve month period. The majority of commenters responded favorably to this new requirement.

The Commission believes that the information in trading suspension orders is important for broker-dealers because they will be apprised of questions the Commission has raised regarding the issuer or its securities that should be considered when they determine to publish quotations. Therefore, the Commission has determined to incorporate the substance of proposed paragraph (a)(6) in the Rule, but has revised the structure of the Rule so that the requirement now appears in paragraph (b).

Information regarding trading suspensions is readily available from the Commission and from other

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[60] For example, a report on Form 8–K must be filed upon the occurrence of a change in control (Item 1); acquisition or disposition of assets (Item 2); bankruptcy or receivership (Item 3); change in accountants (Item 4); and resignations of directors (Item 6). A reporting issuer also may file voluntarily a Form 8–K to report other events that the issuer "deems of importance to security holders" (Item 5).

[61] The Commission's Public Reference Room, telephone (202) 272–7450, can advise a broker-dealer whether an issuer has filed a report under the Exchange Act. Also, the daily SEC News Digest includes a listing of issuers that recently filed Form 8–K reports, including the Form 8–K Item Number pursuant to which the report is filed and the date of the event triggering the report. See note 67 *infra*.

There are three principal means for a broker-dealer to obtain a copy of a report filed with the Commission by an issuer: from the issuer itself; from one of the user organizations that reproduce and distribute reports filed with the Commission; and from the Commission's Public Reference Room. Market makers frequently are on an issuer's mailing list and regularly receive copies of issuer filings. User organizations provide copies of reports for a fee, on a subscription basis, or usually within a short time from the date of a telephone or written request. The Public Reference Room will provide copies for a fee in response to written requests (the response time can be significantly longer than that of the user organizations).

[62] The Commission also notes that reporting issuers file an average of one Form 8–K per issuer per year. See Proposing Release, 54 FR at 39201 n.84.

Also, the Commission recognizes that the requirement to obtain current reports could be viewed as burdensome if the Commission should adopt a proposal to abolish the Rule's piggyback exception, as recommended in Securities Exchange Act Release No. 29095 (April 17, 1991) ("Release 34–29095"), published today. See section III *infra*. The Commission seeks comment in Release 34–29095 whether any difficulties are posed by requiring a broker-dealer to obtain current reports on a regular basis in order to publish quotations.

[63] See Section II.C. *infra*.

[64] However, if prior to the publication of the quotation in a quotation medium, information comes to the knowledge or possession of the broker-dealer that an issuer has filed a more recent Form 8–K, the broker-dealer would have to obtain and review that report.

[65] Any such statement or report is deemed to be "reasonably available" when it is filed with the Commission. Paragraph (a)(5) is not applicable to the quotations for securities of an issuer included in paragraph (a)(3) where a statement or report of that issuer which is required under paragraph (a)(3) is reasonably available to the broker-dealer.

[66] See Securities Exchange Act Release No. 21914 (November 15, 1984), 49 FR 45117. The Commission observes that a broker-dealer's knowledge that an issuer is delinquent in its filing obligations is a significant fact concerning the issuer that must be recorded pursuant to paragraph (b), and considered in reviewing other Rule 15c2–11 information and satisfying the "reasonable basis" requirements of amended paragraph (a). See Section II.A. *supra*.

sources.[67] Moreover, to facilitate compliance with this requirement, the Commission has instituted a telephone service to provide broker-dealers and others with information about trading suspensions recently ordered by the Commission.[68] Callers also can obtain upon request a written list of all trading suspensions ordered within the past twelve months prior to the request.[69] A few commenters suggested that the Commission's telephone service provide a recorded listing of all trading suspensions issued within the past year. While any such enhancement could prove unwieldy if the number of suspensions were large,[70] the telephone service will provide callers with information about the last fifteen trading suspensions or all trading suspensions within the previous 30 days, which ever is greater, ordered by the Commission.

C. Amendments to Paragraphs (c) and (d)

The Commission proposed to amend Rule 15c2–11(c) to require that the broker-dealer preserve the Rule's required information for the period specified in paragraph (b) of Rule 17a–4 [71] under the Exchange Act, namely, for at least a three-year period, the first two years in an easily accessible place. Previously, paragraph (c) stated that the information must be preserved "for the periods specified in Rule 17a–4." However, none of the time periods specified in that rule for retention of various categories of books and records referred directly to Rule 15c2–11 of its recordkeeping requirements.

Five commenters supported this revision; however, one suggested incorporating in the Rule the required retention period. The Commission has followed this suggestion in paragraph (c) as adopted.

The Commission also has amended Rule 15c2–11(d) to extend from two days to three business days the period between the time the broker-dealer submits to the interdealer quotation system the information required by Rule 15c2–11(a)(5) and the time the quotation may be published. This amendment is adopted to afford the interdealer quotation system and regulators sufficient time to obtain and review the information in advance of publication of quotations.

Four commenters supported the proposed revision. One of these commenters, the NASD, proposed that broker-dealers also be required to submit the Rule's required information for review to that association, and believed it should be given the authority to extend the review period for an additional seven business days if it determined further inquiry was necessary. The Commission recently approved an amendment to Schedule H of the NASD By-Laws [72], which requires NASD member firms, before initiating or resuming quotations for non-NASDAQ securities, to provide the NASD with a copy of the Rule's specified information.[73] Under revised Schedule H, the NASD will conduct a review of the member firms' Rule 15c2–11 information. The NASD will notify the broker-dealer if the submission is deficient, and the NASD will act on any amended submission within seven business days of receipt. In light of this revision to Schedule H, the Commission believes it is unnecessary to consider modifying the Rule as recommended by the NASD.

D. Amendment to Paragraph (f)(5)

The Commission has adopted the amendment clarifying that the exception from the Rule afforded by paragraph (f)(5) is limited to securities authorized for inclusion in NASDAQ. Previously, the exception covered "[t]he publication or submission of a quotation respecting a security that is authorized for quotation in an interdealer quotation system sponsored and governed by the rules of a registered securities association * * *."

When paragraph (f)(5) was added to the Rule in 1985, only the NASDAQ system was comprehended within this description. Today, however, other interdealer quotation systems, such as the NASD's OTC Service [74] and PORTAL system [75] could fit within the terms of the exception. It is clear from the release adopting paragraph (f)(5), however, that its scope was intended to be limited to NASDAQ securities.[76] In adopting the exception, the Commission took cognizance of those NASDAQ qualification standards regarding the issuer and the security which tended to promote the public availability of information about the issuer and helped to inhibit the fraudulent trading of shell company securities and similar abuses.[77] Two commenters favored the proposal, although they also urged that quotations for the securities of all reporting issuers be excluded from the Rule's coverage. [78]

The Commission believes that the amendment is necessary to provide notice to broker-dealers regarding the scope of the exception provided in paragraph (f)(5), and conforms the language to its original intent.

III. The Piggyback Exception

The "piggyback" exception of paragraph (f)(3) permits broker-dealers, under specified conditions, to publish or

[67] SEC Today, published by the Washington Service Bureau, Inc., contains the SEC News Digest, which includes information about trading suspensions recently ordered by the Commission.

[68] The Commission's Information Line, at (202) 272–3100, offers the public general information about the Commission. Callers are directed to press "95" to obtain information concerning trading suspensions. After pressing that number, they will receive further instructions on how to reach a recorded message detailing recent trading suspensions and how to obtain from the Commission's Public Reference Room a list of all trading suspensions ordered during the previous twelve months.

[69] Since the broker-dealer must obtain and review specified information regarding a trading suspension for any of the issuer's securities ordered during the twelve months prior to publication or submission of the quotation, it must remain alert to the Commission's issuance of any trading suspension order regarding the issuer's securities after the time it requests the list of trading suspensions from the Commission.

[70] As an atypical but relevant example, within a six-month period in 1988, the Commission suspended trading in the securities of more than 100 pink sheet issuers. See Securities Exchange Act Release No. 25550 (April 15, 1988), 40 SEC Docket (CCH) 841; Securities Exchange Act Release No. 25813 (June 21, 1988), 41 SEC Docket (CCH) 276; Securities Exchange Act Release No. 26064 (September 7, 1988), 41 SEC Docket (CCH) 1021.

[71] 17 CFR 240.17a–4.

[72] NASD By-Laws, Schedule H, Section 4, NASD Manual (CCH) ¶ 1935.

[73] See Securities Exchange Act Release No. 27968 (May 1, 1990), 55 FR 19132.

[74] See Release No. 34–27975A. See also *Letter regarding OTC Bulletin Board Display Service*, Securities Exchange Act Release No. 27976 (May 1, 1990) (granting exemptions from the information gathering and furnishing requirements of Rule 15c2–11 for certain securities eligible for quotation in the OTC Service during its first 60 days of operation).

[75] See Securities Exchange Act Release No. 27928, (April 19, 1990), 55 FR 17933 (approving the PORTAL System). See also *Letter regarding the Private Offering, Resale and Trading through Automated Linkages ("PORTAL") System*, Securities Exchange Act Release No. 27964 (April 30, 1990), (granting an exemption from the information gathering and furnishing requirements of Rule 15c2–11 for certain securities eligible for quotation in the PORTAL System).

[76] The Commission in adopting paragraph (f)(5) stated that an "exception from the Rule has been established for the publication of quotations for securities authorized to be quoted in the NASDAQ system * * *." Securities Exchange Act Release No. 21470 (November 15, 1984), 49 FR 45117, 45119 ("Release 34–21470").

[77] Release No. 34–21470, 49 FR at 45118–45119. Unlike the NASDAQ system, the OTC Service and the PORTAL System will not impose any substantive qualification criteria concerning the issuer or the security quoted.

[78] Because the Commission did not propose to exclude reporting issuers' securities from the Rule, it does not believe that it would be appropriate to consider adopting this recommendation at this time. The Commission notes, however, that the Rule has never excepted from its coverage securities solely based on the fact that the issuers were reporting issuers. *Cf.* Rule 15c2–11(a)(3).

submit quotations for a security without having the information otherwise required by the Rule. For this exception to apply, the security must have been quoted in an interdealer quotation system with the frequency and for the duration specified in the Rule, *i.e.*, quotations must have appeared on at least 12 days during the prior 30 calendar days, with no more than four consecutive business days elapsing without any quotations. Because the Commission is concerned that permitting broker-dealers to piggyback on existing quotations for a security may be inconsistent with, and thus undermine certain of the fundamental goals of the Rule, the Commission solicited comment on whether the piggyback exception should be retained, modified, or eliminated.[79]

After reviewing the comments received on this issue, the Commission today is proposing Rule amendments to narrow substantially the piggyback exception.[80] As described in greater detail in Release 34–29095, the Rule would continue to provide only for a modified version of "self-piggybacking," *i.e.*, where a broker-dealer satisfied the Rule's informational requirements upon initiation or resumption of its quotation for a security, and thereafter published quotations with a specified frequency. The firm also would have an annual information gathering and review requirement.

IV. Final Regulatory Flexibility Analysis

The Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") in accordance with 5 U.S.C. 604 regarding the proposed amendments to Rule 15c2–11. No comments were received on the Commission's Initial Regulatory Flexibility Analysis, although commenters raised concerns regarding the economic burden associated with the amendments to the Rule. The FRFA notes that commenters generally supported the Commission's efforts to strengthen and clarify the obligations of broker-dealers in the penny stock area. The FRFA points out that the review procedures necessary to comply with the revised Rule will not differ appreciably from those expected under the Rule prior to its amendment, and are distinct from an underwriter's due diligence investigation. In addition, the FRFA states the Commission is amending the Rule to require broker-dealers to obtain copies of current reports on Form 8–K because events triggering the filing requirements involve material events affecting the issuer.

The FRFA states that the revised provisions of Rule 15c2–11 are not so burdensome as to outweigh the perceived benefits, namely, that market makers have and review the most current information available when establishing quotations for non-NASDAQ securities.

A copy of the Final Regulatory Flexibility Analysis may be obtained by contacting Jodie J. Kelley, Division of Market Regulation, Securities and Exchange Commission, Washington, DC 20549, (202) 272–2848.

V. Effects on Competition

Section 23(a)(2) of the Exchange Act [81] requires the Commission, in adopting rules under the Exchange Act, to consider any anticompetitive effects of such rules and to balance these effects against the regulatory benefits gained in furthering the purposes of the Exchange Act. The Commission received no comments on any specific competitive burdens that might result from the amendments described in this release. The Commission views the amendments to Rule 15c2–11 as causing no burden on competition unnecessary or inappropriate in furtherance of the purposes of the Exchange Act.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

VI. Statutory Basis and Text of Rule Amendments

The Commission is amending part 240 of chapter II of title 17 of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 is amended by adding the following citation:

Authority: 15 U.S.C. 77c, 77d, 77s, 78c, 78d, 78i, 78j, 78l, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 79q, 79t, 80a–29, 80a–37, unless otherwise noted.

* * * * *

Section 240.15c2–11 also issued under 15 U.S.C. 78j(b), 78*o*(c), 78q(a), and 78w(a).

§ 240.15c2–11 [Amended]

2. The authority citation following § 240.15c2–11 is removed.

3. By amending § 240.15c2–11 by adding a Preliminary Note preceding paragraph (a), by revising paragraph (a) introductory text, paragraphs (a)(1)–(4), and introductory text of paragraph (a)(5), by amending (a)(5)(i) through (xvi) by setting out each paragraph as an individual paragraph, by revising the remaining text after paragraph (a)(5)(xvi) as flush text, and revising paragraphs (b), (c), (d), and (f)(5) to read as follows:

§ 240.15c2–11 Initiation or resumption of quotations without specified information.

Preliminary Note:

Brokers and dealers may wish to refer to Securities Exchange Act Release No. 29094 (April 17, 1991), for a discussion of procedures for gathering and reviewing the information required by this rule and the requirement that a broker or dealer have a reasonable basis for believing that the information is accurate and obtained from reliable sources.

(a) As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, it shall be unlawful for a broker or dealer to publish any quotation for a security or, directly or indirectly, to submit any such quotation for publication, in any quotation medium (as defined in this section) unless such broker or dealer has in its records the documents and information required by this paragraph (for purposes of this section, "paragraph (a) information"), and, based upon a review of the paragraph (a) information together with any other documents and information required by paragraph (b) of this section, has a reasonable basis under the circumstances for believing that the paragraph (a) information is accurate in all material respects, and that the sources of the paragraph (a) information are reliable. The information required pursuant to this paragraph is:

(1) A copy of the prospectus specified by section 10(a) of the Securities Act of 1933 for an issuer that has filed a registration statement under the Securities Act of 1933, other than a registration statement on Form F–6, which became effective less than 90 calendar days prior to the day on which such broker or dealer publishes or submits the quotation to the quotation medium, *Provided* That such registration statement has not thereafter been the subject of a stop order which is still in effect when the quotation is published or submitted; or

(2) A copy of the offering circular provided for under Regulation A under the Securities Act of 1933 for an issuer that has filed a notification under Regulation A and was authorized to commence the offering less than 40 calendar days prior to the day on which such broker or dealer publishes or

[79] See Proposing Release, 54 FR at 39202–39204.

[80] Release 34–29095.

[81] 15 U.S.C. 78w(a)(2).

submits the quotation to the quotation medium, *Provided* That the offering circular provided for under Regulation A has not thereafter become the subject of a suspension order which is still in effect when the quotation is published or submitted; or

(3) A copy of the issuer's most recent annual report filed pursuant to section 13 or 15(d) of the Act or a copy of the annual statement referred to in section 12(g)(2)(G)(i) of the Act, in the case of an issuer required to file reports pursuant to section 13 or 15(d) of the Act or an issuer of a security covered by section 12(g)(2)(B) or (G) of the Act, together with any quarterly and current reports that have been filed under the provisions of the Act by the issuer after such annual report or annual statement; *Provided, however,* That until such issuer has filed its first annual report pursuant to section 13 or 15(d) of the Act or annual statement referred to in section 12(g)(2)(G)(i) of the Act, the broker or dealer has in its records a copy of the prospectus specified by section 10(a) of the Securities Act of 1933 included in a registration statement filed by the issuer under the Securities Act of 1933, other than a registration statement on Form F–6, that became effective within the prior 16 months, or a copy of any registration statement filed by the issuer under section 12 of the Act that became effective within the prior 16 months, together with any quarterly and current reports filed thereafter under section 13 or 15(d) of the Act; and *Provided further,* That the broker or dealer has a reasonable basis under the circumstances for believing that the issuer is current in filing annual, quarterly, and current reports filed pursuant to section 13 or 15(d) of the Act, or, in the case of an insurance company exempted from section 12(g) of the Act by reason of section 12(g)(2)(G) thereof, the annual statement referred to in section 12(g)(2)(G)(i) of the Act; or

(4) The information furnished to the Commission pursuant to § 240.12g3–2(b) since the beginning of the issuer's last fiscal year, in the case of an issuer exempt from section 12(g) of the Act by reason of compliance with the provisions of § 240.12g3–2(b), which information the broker or dealer shall make reasonably available upon request to any person expressing an interest in a proposed transaction in the security with such broker or dealer; or

(5) The following information, which shall be reasonably current in relation to the day the quotation is submitted and which the broker or dealer shall make reasonably available upon request to any person expressing an interest in a proposed transaction in the security with such broker or dealer:

(xvi) * * *

If such information is made available to others upon request pursuant to this paragraph, such delivery, unless otherwise represented, shall not constitute a representation by such broker or dealer that such information is accurate, but shall constitute a representation by such broker or dealer that the information is reasonably current in relation to the day the quotation is submitted, that the broker or dealer has a reasonable basis under the circumstances for believing the information is accurate in all material respects, and that the information was obtained from sources which the broker or dealer has a reasonable basis for believing are reliable. This paragraph (a)(5) shall not apply to any security of an issuer included in paragraph (a)(3) of this section unless a report or statement of such issuer described in paragraph (a)(3) of this section is not reasonably available to the broker or dealer. A report or statement of an issuer described in paragraph (a)(3) of this section shall be "reasonably available" when such report or statement is filed with the Commission.

(b) With respect to any security the quotation of which is within the provisions of this section, the broker or dealer submitting or publishing such quotation shall have in its records the following documents and information:

(1) A record of the circumstances involved in the submission of publication of such quotation, including the identity of the person or persons for whom the quotation is being submitted or published and any information regarding the transactions provided to the broker or dealer by such person or persons;

(2) A copy of any trading suspension order issued by the Commission pursuant to section 12(k) of the Act respecting any securities of the issuer or its predecessor (if any) during the 12 months preceding the date of the publication or submission of the quotation, or a copy of the public release issued by the Commission announcing such trading suspension order; and

(3) A copy or a written record of any other material information (including adverse information) regarding the issuer which comes to the broker's or dealer's knowledge or possession before the publication or submission of the quotation.

(c) The broker or dealer shall preserve the documents and information required under paragraphs (a) and (b) of this section for a period of not less than three years, the first two years in an easily accessible place.

(d)(1) For any security of an issuer included in paragraph (a)(5) of this section, the broker or dealer submitting the quotation shall furnish to the interdealer quotation system (as defined in paragraph (e)(2) of this section), in such form as such system shall prescribe, at least 3 business days before the quotation is published or submitted, the information regarding the security and the issuer which such broker or dealer is required to maintain pursuant to said paragraph (a)(5) of this section.

(2) For any security of an issuer included in paragraph (a)(3) of this section,

(i) a broker-dealer shall be in compliance with the requirement to obtain current reports filed by the issuer if the broker-dealer obtains all current reports filed with the Commission by the issuer as of a date up to five business days in advance of the earlier of the date of submission of the quotation to the quotation medium and the date of submission of the paragraph (a) information pursuant to Schedule H of the By-Laws of the National Association of Securities Dealers, Inc.; and

(ii) a broker-dealer shall be in compliance with the requirement to obtain the annual, quarterly, and current reports filed by the issuer, if the broker-dealer has made arrangements to receive all such reports when filed by the issuer and it has regularly received reports from the issuer on a timely basis, unless the broker-dealer has a reasonable basis under the circumstances for believing that the issuer has failed to file a required report or has filed a report but has not sent it to the broker-dealer.

* * * * *

(f) * * *

(5) The publication or submission of a quotation respecting a security that is authorized for quotation in the NASDAQ system (as defined in § 240.11Ac1–2(a)(3) of this chapter), and such authorization is not suspended, terminated, or prohibited.

* * * * *

By the Commission.

Dated: April 17, 1991.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–9415 Filed 4–24–91; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-29095; File No. S7-9-91]

RIN: 3235-AD94

Initiation or Resumption of Quotations Without Specified Information

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Commission is publishing for comment amendments to Rule 15c2-11 under the Securities Exchange Act of 1934. Rule 15c2-11 governs the submission and publication of quotations by brokers and dealers for certain over-the-counter securities ("covered securities"). With certain exceptions, the Rule prohibits a broker or dealer from publishing a quotation for a covered security in a quotation medium unless it has in its records and reviews specified information concerning the security and the issuer. One exception, commonly known as the "piggyback exception," currently permits a broker-dealer to publish quotations without having the required information when the security has been the subject of recent and frequent interdealer quotations by the firm itself ("self-piggybacking") or other firms.

The proposed amendments would substantially narrow the scope of the piggyback exception, so that only self-piggybacking would be excepted under defined conditions and every broker and dealer generally would be required to obtain and review the specified information before it initiates or resumes a quotation for a covered security. Alternatively, the Commission is considering a total repeal of the piggyback exception. In light of the current recordkeeping requirements of the Rule, and since either modification or repeal of the piggyback exception would increase those costs for some firms, the Commission is also proposing an amendment to the Rule which would encourage the creation of one or more central information repositories by permitting broker-dealers, under certain conditions, to rely on the presence of required issuer information in such a repository instead of maintaining those files internally.

The Commission has provided for an extended comment period in order to obtain the views of broker-dealers that have had experience with the operation of the Rule following the adoption today of amendments relating to a broker-dealer's information gathering and review requirements.

DATES: Comments must be received on or before January 1, 1992.

ADDRESSES: Interested persons should submit three copies of their written data, views, and arguments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, and refer to File No. S7-9-91. All submissions will be available for public inspection and copying in the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Nancy J. Sanow or Jodie Kelley, Office of Trading Practices, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, telephone (202) 272-2848.

SUPPLEMENTARY INFORMATION:

I. Background

A. Prior Commission Action

The Securities and Exchange Commission ("Commission") is proposing amendments to Rule 15c2-11 ("Rule 15c2-11" or "Rule") [1] under the Securities Exchange Act of 1934 ("Exchange Act").[2] This proposal results from comments received in response to a release published in September 1989 soliciting public comment concerning the merits of the Rule's "piggyback exception" [3] and the concept of establishing a central repository for the information required by the Rule.[4] Specifically, the Commission inquired as to whether the piggyback exception should be retained, reformulated, or eliminated, and whether the use of a central repository could be a more efficient means of assembling and retrieving the required information. Sixteen commenters provided written views.[5] The further amendments to the Rule proposed in this release are based on the Commission's review of these responses [6] and represent an additional step in its ongoing efforts to combat abuses in the non-NASDAQ stock markets.

B. Operation of Current Rule 15c2-11 and the Piggyback Exception

Rule 15c2-11 regulates the publication by a broker or dealer of quotations in a quotation medium [7] for certain over-the-counter securities. Adopted in 1971,[8] the

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[1] 17 CFR 240.15c2-11.

[2] 15 U.S.C. 78a *et seq.*

[3] See Securities Exchange Act Release No. 27247 (September 14, 1989), 54 FR 39194 (September 25, 1989) ("the 1989 Release"). The 1989 Release also requested comment on a number of proposed amendments to the Rule. The Commission issued the 1989 Release as part of the continuing effort of the Commission's Penny Stock Fraud Task Force to respond to increasing reports of fraud and manipulation in the penny stock market. See, *e.g.*, the 1989 Release, 54 FR at 39195.

Penny stocks are low-priced, over-the-counter ("OTC") securities that often are quoted in the National Daily Quotation Service, also known as the "pink sheets," which is published and distributed nationally in printed form by the National Quotation Bureau, Inc. It has been the principal interdealer quotation system for equity securities that are neither listed for trading on an exchange nor authorized for inclusion in the NASDAQ system operated by the National Association of Securities Dealers, Inc. ("NASD"). Other printed quotation media are distributed in limited geographical areas, *e.g.*, the Regional Inter-Dealer Over-the-Counter Stock Quotations prepared by Metro Data Company in Minneapolis, Minnesota (known as the "white sheets"). Also, the Commission recently approved an NASD proposal to operate nationally the OTC Bulletin Board Display Service ("OTC Service") on a pilot basis. The OTC Service is designed to capture and display electronically real-time quotations of market makers in non-NASDAQ securities. Securities Exchange Act Release No. 27975-A (May 30, 1990), 55 FR 23161 ("Release 34-27975-A"), SEC File No. SR-NASD-88-19. In this release, the OTC securities quoted in these quotation media are referred to as "non-NASDAQ securities," and the markets in which these securities are traded are referred to as the "non-NASDAQ market."

[4] See the 1989 Release, 54 FR at 39202-39204 and Section II, *infra*. In a companion release, the Commission today is adopting, with certain modifications, the proposed amendments described in the 1989 Release. Securities Exchange Act Release No. 29094 (April 17, 1991) ("Release 34-29094").

[5] The letters of comment, together with a Summary of Comments prepared by the Commission's staff, are included in File No. S7-27-89 and are available for review and copying in the Commission's Public Reference Room.

[6] The Commission also considered comments received in response to Securities Exchange Act Release No. 21914 (April 1, 1985), 50 FR 14111 ("Release 34-21914"). A summary of these comments, which related to the costs and benefits of the Rule, has been prepared by the staff and is available for inspection and copying in File No. S7-14-85.

[7] The term "quotation medium" is defined in paragraph (e)(1) of the Rule, 17 CFR 240.15c2-11(e)(1), to include any interdealer quotation system or any publication or electronic communications network or other device used by broker-dealers to make known their interest in transactions in any security. The term "interdealer quotation system" is defined in paragraph (e)(2) of the Rule, 17 CFR 240.15c2-11(e)(2), to mean "any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers."

[8] See Securities Exchange Act Release No. 9310 (September 13, 1971), 36 FR at 18641 ("Release 34-9310"). Rule 15c2-11 was adopted under Section 15(c)(2) of the Exchange Act, 15 U.S.C. 78o(c)(2), among other sections. Section 15(c)(2) provides the Commission with broad authority to promulgate rules that prescribe means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices in the over-the-counter market.

Rule is designed primarily to prevent certain manipulative and fraudulent trading schemes that had arisen initially in connection with the distribution and trading of securities issued by "shell" companies (*i.e.*, companies with few or no assets) [9] or other issuers having outstanding but infrequently-traded securities. The Rule is intended to prevent brokers and dealers from disseminating quotations in the absence of information about the issuer, an activity that has been critical to the success of many of the unlawful schemes.[10] The Rule focuses on the fraudulent and manipulative potential of quotations. A violation of the Rule may occur regardless of whether the broker-dealer also is engaged in retail activity in the security,[11] or whether any interdealer transactions have occurred.[12]

Subject to certain exceptions,[13] the Rule prohibits a broker or dealer from submitting a quotation [14] for publication in a quotation medium unless it has in its records specified information concerning the security and the issuer. The broker or dealer must have in its records: (1) In the case of an issuer that has conducted a recent public offering registered under the Securities Act of 1933 ("Securities Act") [15] or qualified pursuant to Regulation A under the Securities Act,[16] a copy of the pertinent prospectus [17] or offering circular;[18] or (2) in the case of an issuer that must file reports pursuant to sections 13 [19] or 15(d) [20] of the Exchange Act or is an insurance company of the kind specified in section 12(g)(2)(G) of the Exchange Act,[21] the issuer's most recent annual report and any periodic and current reports filed thereafter;[22] or (3) in the case of foreign issuers exempt from Section 12(g) of the Exchange Act, the information furnished to Commission pursuant to Rule 12g3-2(b) [23] under the Exchange Act.[24] In order to submit a quotation for the security of an issuer that does not fall into one of the above categories, the broker or dealer must have in its records the information, including certain financial information, specified in paragraph (a)(5) of the Rule.[25]

The broker or dealer must review the foregoing information (*i.e.*, "paragraph (a) information"), together with other information regarding the issuer in the broker-dealer's knowledge on possession,[26] and, based on such review, have a reasonable basis for believing that the paragraph (a) information is accurate and that it was obtained from reliable sources.[27]

Under paragraph (f)(3),[28] the piggyback exception, the Rule's information maintenance requirements are not applicable when a broker or dealer enters, in an interdealer quotation system,[29] a quotation for a security that has been the subject of quotations by the firm or other broker-dealers on at least 12 business days during the previous 30 calendar days, with no more than four consecutive business days elapsing without any quotations. As a result, until 30 calendar days have elapsed from the date of publication of the initial broker-dealer's quotation, no broker-dealer may publish a quotation unless it has satisfied the information requirements.[30] After the 30-day period, a broker-dealer may publish a quotation without having the required information if the 12 and 4 day tests are satisfied (*i.e.*, the broker-dealer may "piggyback" on the previously published quotations). The piggyback exception assumes that the quotation of a security subject to regular and frequent two-sided market making will reflect independent supply and demand forces.[31]

Consequently, the Rule's information requirements apply only upon "initiation or resumption" [32] of a quotation in a quotation medium for a security that has not been quoted with the required frequency during the previous 30 days. Rule 15c2-11 therefore does not require any broker-dealer to obtain updated

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[9] Rule 15c2-11 was intended to address a variety of questionable practices involving a "spin-off" or other distribution to the public of the securities of a shell corporation and the subsequent active trading of those shares at increasingly higher prices that bore no relation to the value of the securities. See Release 34-9310, 36 FR at 18641.

[10] Release 34-9310, 36 FR at 18641. As to the scope and objectives of the Rule, see also Securities Exchange Act Release No. 21470 (November 15, 1984), 49 FR 45117 ("Release 34-21470") [adopting amendments to Rule 15c2-11) and Release 34-29094. The Rule "seeks to guard against 'the fraudulent and manipulative potential inherent * * * when a * * * dealer submits quotations concerning any infrequently-traded security in the absence of certain information.'" *Gotham Securities Corporation*, 46 SEC 723, 725 (1976), *citing* Release 34-9310.

[11] See *Alessandrini & Co., Inc.*, 45 SEC 399, 401. The objective in having quotations published for a security may not be to trade the security, but to establish an apparent value for the security. Apparent value is important, for example, where the security is serving as collateral for loans. See, *e.g.*, id. at 400.

[12] See *Richfield Securities, Inc.*, Securities Exchange Act Release No. 26129 (September 29, 1988), 41 SEC Docket (CCH) 1235.

[13] In addition to the piggyback exception, discussed *infra*, the Rule excepts from its coverage publication or submission of a quotation in the OTC market for a security admitted to trading on a national securities exchange (if traded on that exchange on the same day or on the day before submission of the quotation), or a security authorized for quotation in the NASDAQ system operated by the National Association of Securities Dealers, Inc. ("NASD"). See paragraphs (f)(1) and (f)(5) of the Rule, respectively, 17 CFR 240.15c2-11 (f)(1) and (f)(5). As a result, the Rule's focus is the residual OTC market, or the "non-NASDAQ market." See *supra* n.3.

Paragraph (f)(2) of the Rule, 17 CFR 240.15c2-11(f)(2), contains a further exception where a quotation is submitted solely to represent an unsolicited customer interest in buying or selling a covered security. However, two-way (bid and asked) priced quotations representing an unsolicited customer interest are not excepted unless identified as such in the quotation medium. See section II, *infra*.

[14] "Quotation" is defined in paragraph (e)(3) of the Rule, 17 CFR 240.15c2-11(e)(3), to include any advertisement by a broker or dealer that he wishes to buy or sell a particular security at a specified price or otherwise. In 1984, the Commission expanded the definition of quotation to include the publication by broker-dealers of trading interest in a security without specifying the prices at which the broker-dealer would engage in those transactions ("name-only entries"). Release 34-21470, 49 FR at 45119.

[15] 15 U.S.C. 77a *et seq.*

[16] 17 CFR 230.251 *et seq.*

[17] 17 CFR 240.15c2-11(a)(1) [registration statement must have become effective within the preceding 90 calendar days).

[18] 17 CFR 240.15c2-11(a)(2) [notification regarding the offering must have become effective within the preceding 40 calendar days).

[19] 15 U.S.C. 78m.

[20] 15 U.S.C. 78*o*(d).

[21] 15 U.S.C. 78*l*(g)(2)(G).

[22] 17 CFR 240.15c2-11(a)(3). In the case of an issuer that has become a reporting issuer but has not filed its first annual report, it may now satisfy this paragraph by having in its records certain other previously filed materials. See Release 34-29094.

[23] 17 CFR 240.12g3-2(b).

[24] 17 CFR 240.15c2-11(a)(4).

[25] 17 CFR 240.15c2-11(a)(5). Paragraph (a)(5) also provides: "This paragraph (a)(5) shall not apply to any security of an issuer included in paragraph (a)(3) of this section unless a report is not reasonably available to the broker or dealer. A report or statement of an issuer described in paragraph (a)(3) of this section shall be 'reasonably available' when such report or statement is filed with the Commission."

[26] See 17 CFR 240.15c2-11(b). This includes Commission orders or releases relating to summary suspensions of trading in any of the issuer's securities during the preceding 12 months.

[27] Release 34-29094.

[28] See 17 CFR 240.15c2-11(b). This includes Commission orders or releases relating to summary suspensions of trading in any of the issuer's securities during the preceding 12 months.

[29] Release 34-29094.

[30] 17 CFR 240.15c2-11(f)(3).

[31] See *supra* n.7.

[32] See Release 34-9310, 36 FR at 18641 n.2. Moreover, unless the interdealer quotation system specifically identifies quotations that represent unsolicited customer indications of interest, a broker-dealer may piggyback only where a security has been the subject of both bid and ask quotations at specified prices for the time periods enumerated in the Rule. Compare paragraph (f)(3)(i) with paragraph (f)(3)(ii).

[33] See Release 34-21470, 49 FR at 45121, and section II, infra.

[34] If the Commission repeals the piggyback exception, as discussed in Section II, *infra*, the title of the Rule, which contains the quoted language, would be modified to reflect the impact of the amendment.

information about the issuer or its securities as long as the piggyback exception applies to the quotation. In particular, the Rule permits "self-piggybacking," or the ability of a firm to continue making a market indefinitely, on the basis of its own prior quotations, without any requirement that the firm seek to update its issuer information files.[33]

C. The Commission's Request in the 1989 Release for Comments Concerning the Piggyback Exception

1.Issues Presented

In the 1989 Release, the Commission stated its concern that, under present circumstances, permitting broker-dealers to piggyback on existing quotations for a security may be undermining, and may be inconsistent with, the fundamental goals of the Rule. In that regard, the Commission noted that the piggyback exception has been based upon a premise that the market for a security subject to regular and frequent quotations by market makers usually will reflect independent supply and demand forces and thus lead to fair pricing of the subject securities. The deeper premise of this view, the Commission observed, appears to be that trading solely on the basis of perceived indications of supply and demand without having basic information about the issuer is an appropriate market making function.[34]

The Commission questioned whether these premises continued to have vitality in light of developments since the Rule's adoption. When the Rule was adopted, it covered a broad spectrum of OTC securities, including a very large number of widely-followed stocks subject to regular two-way priced quotations by multiple competing market makers. To a major extent, trading interest (*i.e.*, supply and demand forces) could be gauged from such quotations, and they could be used as a guide to pricing decisions of investors and other professionals. Today, the Rule applies principally to the non-NASDAQ market, predominantly consisting of infrequently-traded, relatively unknown securities with unpriced quotation entries and little or no competition among market makers.[35]

The Commission therefore expressed its concern that the piggyback provision can result in market makers unwittingly facilitating fraudulent schemes in that their introduction of quotations can add credibility to the illusion of a legitimate market for the securities involved. The Commission concluded preliminarily that removing the piggyback exception, thereby extending the Rule's information gathering and review requirements to all participating market makers, would further the efficient valuation of non-NASDAQ securities and increase the likelihood that fraudulent schemes would be quickly exposed.[36]

The Commission also noted that, at least for firms engaged in a retail business, the elimination of the piggyback exception should impose no new burdens. Because such firms must have a reasonable basis for any recommendations to customers, they have an obligation to be familiar with material information about issuers of any recommended security for which they also make markets.[37]

In addition, the Commission pointed to the difficulty that broker-dealers may have in determining whether the conditions for availability of the piggyback exception have been satisfied.[38] Because the pink sheets, for example, are disseminated in paper format, the broker-dealer is required to have available and review a month's collection of pink sheet quotations before initiating or resuming a quotation.[39] As a consequence, the Commission understands that some market makers ignore the piggyback exception and obtain the required information about the issuer in all cases.[40]

2. Comments Received

A total of 16 commenters responded to the Commission's inquiries on the piggyback exception.[41] Six commenters supported retention of the piggyback exception. They indicated that the provision is a major feature of the Rule and is relied upon by many market participants. Some of these commenters suggested that if the exception were eliminated or materially limited, broker-dealers might decide that it was uneconomical to continue making markets for many non-NASDAQ securities.

Four commenters specifically supported retaining the ability of broker-dealers to self-piggyback. Some of these commenters noted that elimination of the ability to self-piggyback would place financial and administrative burdens on market makers to gather the required information, and would contribute to a cessation of market making, reduced liquidity, and thus impaired valuation for many non-NASDAQ securities.

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[33] Many market makers update their information routinely to keep abreast of developments affecting the issuer, to satisfy other obligations under the securities laws (*e.g.*, the need to have a reasonable basis when recommending securities to customers), and to satisfy suitability requirements. See, *e.g.*, *Hanly* v. *SEC*, 415 F.2d 589 (2d Cir. 1969), *affirming Richard J. Buck & Co.*, 43 S.E.C. 998 (1968); *see also* Securities Exchange Act Release No. 26100 (September 22, 1988), 53 FR 37778, 37787, and cases cited therein. The Commission has stated that the Rule "is not intended to, and does not, excuse brokers and dealers from their duty to comply with applicable registration and other anti-fraud provisions of the federal securities laws and Commission rules." Release 34-9310, 36 FR at 18641. *See also*, New York Stock Exchange Rule 405, NYSE Guide (CCH) ¶2405; NASD Rules of Fair Practice, Art. III, Sec. 2, NASD Manual (CCH) ¶2152.

[34] 54 FR at 39202. In discussing this trading "by the numbers," the Commission has cautioned that—"when * * * a dealer [has] no basis on which those numbers could be related to the security's investment value, careful scrutiny of all surrounding circumstances with a view to detecting any sign of possible manipulation [is] called for."

Alessandrini, *supra* n.11, at 405. See also Release 34-29094.

[35] *See infra* nn.44-45 and accompanying text.

[36] 54 FR at 39203. In responding to the Commission's requests for comments on then proposed Rule 15c2-6 under the Exchange Act, see Securities Exchange Act Release No. 26529 (February 8, 1989), 54 FR 6693, a number of commenters indicated that broker-dealers that publish quotations for non-NASDAQ securities without having information about the issuer may be contributing to the "penny stock fraud" phenomenon. These commenters suggested that the Commission consider eliminating the Rule 15c2-11 piggyback exception. See, *e.g.*, letter from American Bar Association, Section of Business Law, Committee on Federal Regulation of Securities, Subcommittee on Broker-Dealer Matters, to Jonathan G. Katz, Secretary, SEC (April 25, 1989); letter from Frank J. Wilson, Executive Vice President and General Counsel, NASD (June 15, 1989). Other commenters on proposed Rule 15c2-6 similarly pointed to the lack of issuer information available to potential investors in non-NASDAQ securities. These commenters suggested that Rule 15c2-11 type information should be available to prospective investors, and the information could be supplied by broker-dealers that recommend the purchase of such securities. *See, e.g.*, letter from Lowy & Chernis, P.C., to SEC, Division of Market Regulation (May 11, 1989); letter from Malone & Associates, Inc., to Jonathan G. Katz, Secretary, SEC (March 29, 1989). These comment letters are contained in File No. S7-3-89 in the Commission's Public Reference Room.

[37] *See, e.g.*, letter from Sutro & Co. Incorporated to John Wheeler, Secretary, SEC (June 7, 1985), and letter from Blinder Robinson & Co., Inc. to John Wheeler, Secretary, SEC (June 4, 1985), included in File No. S7-14-85. *See also supra* n.33.

[38] See supra text accompanying nn. 28-30.

[39] At this time, it is unclear what impact the development of the NASD's OTC Service may have on the ability of participants in that system to determine whether the Rule's piggyback conditions have been satisfied.

[40] Additionally, the Commission restated its long-held concern relating to the incidence of non-compliance with the conditions of the piggyback exception. It was noted, however, that the National Quotation Bureau had initiated new monitoring procedures. 54 FR at 39203, n.102. Further, following the 1989 Release, the NASD established procedures for overseeing member compliance with the provision. *See* Securities Exchange Act Release No. 27968 (May 5, 1990), 55 FR 19132, File No. SR-NASD-90-2. In the case of the OTC Service, the NASD has developed special compliance procedures. See Release 34-27975-A, 55 FR at 23165.

[41] *See supra* n.5.

Seven commenters favored elimination or some modification of the current piggyback exception. Four of these commenters believed that the exception could be eliminated for retail broker-dealers, but favored maintaining the ability of wholesale broker-dealers to piggyback. Two commenters stated that the piggyback exception was inconsistent with the fundamental purposes of the Rule. One of these commenters, the NASD, believed that all market makers should be required to obtain the prescribed information from a reliable source and to conduct a basic review of that information as a condition to commencing quotations in non-NASDAQ securities. The NASD stated that elimination of the piggyback provision should result in more competitive and efficient pricing of these securities by market makers. The NASD expressed concern that the current piggyback provision could be relied upon by a broker-dealer entering the quotation medium as an accommodation to another broker-dealer or in facilitation of a fraudulent scheme. The NASD argued that the original justification for the exception (*i.e.*, that regular and frequent two-sided priced quotations reflect independent supply and demand forces) no longer exists because of the prevalence of name-only (unpriced) entries in these markets.

Fourteen commenters supported creation of a central repository of Rule 15c2–11 information. The NASD, which had been among the first to suggest the concept of a central repository,[42] stated that any initiatives respecting an electronic repository should be left to providers of commercial research services and that formal consideration of such a repository should be deferred until the Commission's Electronic Data Gathering, Analysis and Retrieval system (EDGAR) program is fully implemented.[43]

[42] See letter from NASD to John Wheeler, Secretary, SEC, dated December 16, 1985, included in File No. S7–14–85. The NASD also commented that while the existence of a repository would ease the compliance burden for market makers, it should not relieve them of the obligation reasonably to determine that the information on record is complete, current, and obtained from a reliable source. The NASD argued that, absent an alternative means of certifying that the repository's files satisfy these aspects of the Rule, the fact that a broker-dealer had access to that file should not satisfy a broker-dealer's review obligations under the Rule.

[43] *Cf.* 54 SEC Ann. Rep. 39 (1988) (discussing the EDGAR system). *See also* Securities Exchange Act Release No. 22446, (September 23, 1985), 50 FR 40479.

Several commenters noted that establishment of a central repository would obviate the need for the piggyback provision by making the required information instantly available through an electronic data base. A few commenters believed that a repository would promote equal access to information and would significantly reduce compliance costs. Supporters of a central repository offered a number of suggestions covering such matters as who should establish the repository; who should be required to file the data; whether to indicate that the issuer is current in filing its required reports; and how to finance such a system.

II. Discussion

The Commission has carefully reviewed the submissions received in response to the 1989 Release and has determined to propose amendments to Rule 15c2–11 that would modify substantially or, alternatively, repeal the piggyback exception. At the same time, the Commission believes that the establishment of a central repository of issuer and related information that the Rule requires broker-dealers individually to gather and maintain should be encouraged.

A. Reasons for the Proposals

It appears to the Commission that the underlying assumption of the piggyback exception, *i.e.*, that regular and frequent quotations for a security generally reflect supply and demand forces based on independent, informed pricing decisions, may not be valid in the context of the present-day coverage of the Rule, which is now primarily limited to the non-NASDAQ market. As observed by the Commission in the 1989 Release, and as confirmed by the NASD's similar regulatory experience,[44] the markets for non-NASDAQ securities, in general, do not now conform to that underlying assumption. Investigations involving those securities in the past few years, for example, demonstrate that low-priced, relatively unknown, speculative stocks predominate in those markets, and that the markets are frequently characterized by a prevalence of name-only quotations and an absence of market making, as well as retail, competition.[45] Since those markets seldom display the kind of supply/demand influences assumed by the present piggyback exception, the rationale for the provision is open to serious question.

The Commission preliminarily believes, therefore, that corrective regulatory action is now needed to enhance the quality of pricing decisions and better position each broker or dealer initiating or resuming quotations to guard against becoming an unwitting participant in incipient or ongoing fraudulent and manipulative schemes with respect to the security. A desirable by-product of substantially narrowing the scope of the piggyback exception, or eliminating it, would be a regular flow of significant and current information into the marketplace, thus increasing the quality of decisionmaking, including pricing determinations, of all market participants. In the Commission's experience, the kinds of fraud and manipulation at which the Rule is aimed are far more difficult to carry out in an informed market environment.

[44] Letter from NASD to Jonathan G. Katz, Secretary, SEC, pp. 6–7, dated February 15, 1990, included in File No. S7–27–89.

[45] See, *e.g.*, *SEC* v. *Brownstone-Smith Securities Corp., No.* 89–6249–CIV–GONZALEZ (S.D. Fla. permanent injunction entered May 25, 1989), *summarized in* Litigation Release No. 12126 (June 12, 1989), 43 SEC Docket (CCH) 1748, and No. 12132 (June 16, 1989), 43 SEC Docket (CCH) 1841.

B. Modified "Self-Piggybacking" Proposal

In order to achieve the foregoing policy objectives, the Commission preliminarily is of the view that it is appropriate to require all market makers in a non-NASDAQ security, not only the firm whose quotations establish the piggyback exception in the first instance, to collect and review the Rule's required information whenever they initiate or resume their quotations. The Commission also preliminarily believes, however, that there is a substantial basis for providing somewhat different treatment for self-piggybacking. In this regard, a crucial distinction between self-piggybacking and piggybacking in general is that a self-piggybacking firm will have collected and reviewed the information required by the Rule prior to initiating or resuming its quotations, whereas a broker-dealer piggybacking on another broker-dealer's quotations may never have reviewed information about the security or its issuer.

Moreover, total repeal of piggybacking (including self-piggybacking) might impose substantial costs by placing on every market maker publishing quotes for a non-NASDAQ security the responsibility to gather, review, and maintain, on a current basis and throughout the time that it publishes quotations for the security, the documents concerning that security and the issuer called for by the Rule. Accordingly, the Commission believes that it would be consistent with the

purposes of the Rule to retain a modified version of the piggyback exception for a firm that has satisfied the information gathering and review requirements upon its initiation of quotations and thereafter regularly publishes quotations for the security. Specifically, under the proposed approach, every broker-dealer, on initiating or resuming its quotations for a non-NASDAQ security, would have to gather and review the required information concerning the issuer, and then publish quotations satisfying the current 30-day quotation frequency requirements.[46] The broker-dealer thereafter would be able to publish quotations without gathering additional information ("self-piggyback") until the occurrence of the earlier of (1) a hiatus of four consecutive business days in publication of the firm's quotations for the security, (2) a failure by the firm to meet the minimum quotation frequency criterion of 12 business days per 30-calendar-day period, or (3) the yearly anniversary of the date of initiation of quotations in the security by the firm. At that point, the firm would be required to obtain and review the then current required information prior to resuming or continuing quotations. In this way, there would be some assurance that reasonably current information relating to non-NASDAQ issuers would continue to be available to, and reviewed by, market makers and others to help prevent fraud and to facilitate pricing decisions. The Commission preliminarily believes that an annual informational gathering and review requirement fulfills the objectives of the Rule without imposing significant burdens on market makers. The Commission solicits comment on the costs and benefits of this updating requirement, and whether other alternatives would be equally effective. Also, the Commission solicits comment on whether, in the context of its consideration of changes in the piggyback provision, the Commission should distinguish between wholesale and retail firms.[47] Finally, the Commission seeks comment on whether total repeal of the provision would be preferable to the modified self-piggybacking proposal.

C. Costs and Benefits

The Commission has taken into account the fact that, if the piggyback exception were narrowed or eliminated as proposed herein, the recordkeeping burdens and costs of some firms would be increased. As has previously been noted, however, the Commission is aware that many broker-dealers routinely assemble and maintain the specified information, despite the availability of the piggyback exception, for example, in order to fulfill their retail obligations to public customers or to simplify their compliance with the Rule.[48] Moreover, in view of the expected benefits of the proposed amendments, discussed above, the Commission believes that, on balance, any additional costs associated with curtailment of the exception would be justified.[49]

In reaching this preliminary conclusion, the Commission has considered the following factors. First, the Commission understands that market makers often are included on an issuer's mailing list or subscribe to a recognized document retrieval service and regularly receive documents publicly disseminated by the issuer. If an exception (e.g., a piggyback exception) were not available, a broker-dealer who, by such means, has received an issuer's reports or other required information on a timely basis for a period of time, may reasonably assume that it has satisfied the requirements of the Rule unless the broker-dealer has contrary information, e.g., that the issuer has failed to file a required report or has filed a report that has not been sent to the broker-dealer.[50]

Second, as already noted,[51] when paragraph (a)(3) information for a reporting issuer is not reasonably available, *e.g.*, because the issuer is delinquent in its filing obligations, the broker-dealer may substitute the information specified by paragraph (a)(5) in order to publish or submit quotations.[52] Broker-dealers usually should encounter little difficulty or costs in complying with their more limited obligations under paragraph (a)(5). In general, a broker-dealer that cannot piggyback or self-piggyback need only update its information files concerning paragraph (a)(5) issuers about once a year unless, of course, it has knowledge of intervening circumstances (*e.g.*, a trading suspension or other "red flags") that would call for earlier inquiry on its part.[53] If "reasonably current" paragraph (a)(5) information is unavailable, however, the broker-dealer may not publish or submit a quotation, unless an exception to, or an exemption from, the Rule is applicable.[54]

D. Bankruptcy Situations

In the 1989 Release,[55] the Commission inquired specifically whether there were situations, such as where the issuer was in bankruptcy, that should be addressed in the Rule if self-piggybacking were eliminated. Many commenters focused on this issue as it related to debtor companies and other issuers as to which current information was not available for purposes of satisfying the Rule's requirements. These commenters urged that it was in the public interest to permit continuation of all quotations for securities of these issuers; however, all favored a requirement that the absence of such information be highlighted appropriately in the quotation medium by a designation, such as the symbol "VJ" traditionally utilized in the pink sheets for issuers in bankruptcy.

The Commission is of the view that to permit the initiation or indefinite continuation of quotations where not even the basic information provided for by paragraph (a)(5) of the Rule is

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[46] See *supra* text accompanying nn. 28–33.

[47] See Release 34–29094 at text accompanying nn. 20–22 and 37–39.

[48] See supra n. 33 and text accompanying nn. 38–40.

[49] In considering the anticipated compliance costs resulting from the proposed amendments, it should be borne in mind that there may be some partially offsetting reductions of such burdens. As suggested in the 1989 Release, 54 FR at 39203, there are now certain costs incurred by broker-dealers in monitoring their compliance with the piggyback provision. These costs would be reduced significantly if the modified self-piggybacking proposal were adopted and would no longer exist if the total repeal alternative were adopted. Other monitoring costs might also be reduced or avoided. See supra n. 40.

[50] See Release 34–29094.

[51] *Supra* n. 25.

[52] See Release 34–21470, 49 FR at 45117. The Commission observes that the fact that an issuer is known to be delinquent in its filing obligations is a fact concerning the issuer that must be recorded pursuant to paragraph (b), and considered in reviewing other Rule 15c2–11 information and satisfying the "reasonable basis" requirement of paragraph (a).

[53] See paragraph (g) of the Rule. Under this provision, paragraph (a)(5) issuer information is presumed to be "reasonably current" if: "(1) The balance sheet is as of a date less than 16 months before the publication or submission of the quotation, the statements of profit and loss and retained earnings are for the 12 months preceding the date of such balance sheet, and if such balance sheet is not as of a date less than 6 months before the publication or submission of the quotation, it shall be accompanied by additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than 6 months before the publication or submission of the quotation. (2) Other information regarding the issuer specified in paragraph (a)(5) of this section is as of a date within 12 months prior to the publication or submission of the quotation."

See also Release 34–29094 (discussing the review obligations of brokers and dealers under the Rule).

Additionally, it should be noted that under the modified self-piggybacking proposal, a qualifying broker-dealer's updating responsibilities with respect to reporting and non-reporting issuers would be substantially parallel.

[54] See paragraphs (f) and (h) of the Rule and *supra* n. 15.

[55] 54 FR at 39203.

available to the marketplace would directly undercut the prophylactic design of the Rule and might in fact encourage the abuses sought to be prevented. Moreover, even assuming that a workable system could be developed for identifying issuers that are delinquent in meeting their reporting obligations or have failed to publish "reasonably current" paragraph (a)(5) information, a general exception to the Rule along the lines suggested would remove a significant incentive for these issuers to provide information to their current and prospective security holders, and market participants generally. Nonetheless, in individual cases where it can be established that, for example, because of the issuer's depleted financial condition and limitations necessarily imposed in a pending bankruptcy proceeding, it is not practicable to generate all of the requisite information, the Commission would be prepared to consider granting exemptions under paragraph (h) of the Rule. In evaluating an exemption request, however, the Commission would generally consider the procedures that had been, and would be, used to disclose to the marketplace the extraordinary nature of the circumstances relating to the particular issuer, and the efforts that the issuer had made to fulfill applicable Exchange Act reporting obligations.[56]

E. Central Information Repository

The possible net addition of recordkeeping costs as a result of narrowing or eliminating the piggyback exception further highlights the desirability of creating a central database for information on non-NASDAQ issuers and their securities. In that regard, the Commission strongly supports the development of one or more central repositories for Rule 15c2–11 information. The use of such repositories may provide a more efficient vehicle for meeting the information gathering needs of brokers and dealers, including firms seeking to comply not only with Rule 15c2–11, but also with other applicable requirements.[57] The repositories can also substantially increase the availability of information on non-NASDAQ issuers to investors, other professionals, and interested regulators.[58]

In light of the potential benefits of the Rule 15c2–11 information repository concept and the NASD's recommendation that initiatives for the development of repositories be left to private commercial interests, the Commission has preliminarily determined to encourage such initiatives. In this connection, the Commission believes that the existence of a repository containing the elementary features discussed in or implied by the prior industry comments might justify an exception from Rule 15c2–11's recordkeeping provisions with respect to the documents available to the subject broker-dealer through a recognized repository.[59] Accordingly, the Commission is proposing for comment an amendment to the Rule that would accomplish that result.[60] While the proposal contemplates a reduction of record gathering and maintenance burdens for individual firms, it would not affect a broker-dealer's obligation under the Rule reasonably to review and satisfy itself as to the sources and accuracy of the specified information.

In addition, the Commission requests comments on what further steps for reducing or eliminating current regulatory requirements might be considered if a repository is implemented.

F. Identification of Unsolicited Customer Indications of Interest

The proposed modification or deletion of the piggyback exception raises a further issue which commenters are requested to address. At the present time, both the pink sheets and the NASD's OTC Service provide for the identification of quotations that represent unsolicited customer indications of interest.[61] A major reason why these quotation mediums have adopted this practice appears to be that, under paragraph (f)(3) of the Rule, participating brokers and dealers can take advantage of the piggyback exception under conditions that are less restrictive than would be available if such customer interests were not identified.[62]

Paragraph (f)(3)(i) permits broker-dealers to piggyback in an interdealer quotation system that specifically identifies unsolicited customer indications of interest if the security has been the subject of *any* form of quotations (exclusive of any identified customer interests) with the frequency and for the duration required by the Rule. Paragraph (f)(3)(ii), however, provides that in order to piggyback in an interdealer quotation system that does not identify unsolicited customer indications of interest, the security must have been "the subject of *both* bid and ask quotations * * * at *specified prices*" with the requisite frequency and duration in the system (emphasis added).

The current, more restrictive piggyback conditions applicable to quotations systems that do not identify those interests are founded on two factors. First, a quotation reflecting an unsolicited customer's interest in buying or selling a particular OTC security normally is a much weaker indicator of the security's market activity and liquidity ("quality of market") than other quotations, particularly quotations reflecting a market maker's proprietary interest. Second, firms entering solely unsolicited customer interests generally are not subject to the information gathering and review requirements of the Rule.[63] This can further weaken the quotation's quality-of-market value. Thus, the present Rule reflects the Commission's view that, in the absence of disclosure in the interdealer quotation system as to the source of the quotation, the quality of market needed to qualify the security for the piggyback exception should be set at a higher level.[64]

[56] *Cf. SEC Staff No-action Letter Regarding MMR Holding Corporation* (December 6, 1990).

[57] See, *e.g.*, *supra* n.33.

[58] See *supra* nn.42–43.

[59] Cf. Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799 (adopting Rule 15c2–12, 17 CFR 240.15c2–12). As indicated in some of the responses to the 1989 Release, the potential benefits of such information systems correspond in many ways to those projected for the Commission's EDGAR system. While the Commission believes that, because of the similarity of concepts and objectives, these systems may someday be linked, it does not believe that the development of Rule 15c2–11 repositories need await full EDGAR implementation or the formulation of plans and policies for such linkages, as recommended by the NASD. See *supra* n. 42.

[60] See proposed paragraph (a) of the Rule, *infra*. In determining whether to designate a particular entity as a securities information repository, the Commission would consider, among other things, whether the repository: (1) collects information about a substantial segment of non-NASDAQ issuers; (2) maintains current, accurate information about the issuers of non-NASDAQ securities; (3) has effective acquisition, retrieval, and dissemination systems; (4) places no inappropriate limits on the issuers from or about which it will accept information; (5) provides access to the documents deposited with it to anyone willing and able to pay the applicable fees; and (6) charges reasonable fees.

[61] Both systems use the designation "UNS" to identify each quotation reflecting an unsolicited customer indication of interest. See Release 34–27975–A, 55 FR at 23161.

[62] See Release 34–21470, 49 FR at 45121.

[63] See *supra* n.13. In contrast, on NASDAQ, an interdealer quotation system that is excepted from the Rule, see paragraph (f)(5), the published quotations must reflect prices at which the firm is willing to transact business for its own account. See NASD By-laws, Schedule D, NASD Manual (CCH), ¶1819.

[64] The current exclusion of the identified quotes from the formula for determining whether the more

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With the modification or elimination of present paragraph (f)(3), as proposed, this purpose for identification, and the distinction between quotation mediums based upon such identification, would be removed. A question then arises as to whether the Commission should mandate the continuation of the practice, *i.e.*, by requiring broker-dealers to identify their quotations in an interdealer quotation system that represent unsolicited customer indications of interest. Because such identification provides market participants with valuable information concerning the quality of market for a non-NASDAQ security, the Commission preliminarily believes that the practice should continue notwithstanding the modification of the piggyback provision. Accordingly, the Commission proposes to amend the Rule to require identification of quotations representing unsolicited customer indications of interest.[65]

C. The Furnishing of Issuer Information to Interdealer Quotation Systems under Paragraph (d)

Under paragraph (d) of the Rule, a broker-dealer wishing to submit a quotation for publication in an interdealer quotation system pursuant to paragraph (a)(5) is required to furnish to the system in advance the information described in paragraph (a)(5). This requirement was included in the Rule to facilitate the cooperative surveillance efforts of the system with those of the Commission staff with respect to the markets for securities of paragraph (a)(5) (*i.e.*, non-reporting) issuers. Until recently, the National Quotation Bureau (publisher of the pink sheets), which is a private commercial enterprise, was the principal quotation medium for such securities.[66] As noted above, however, the NASD, which is both a registered self-regulatory organization and the sponsor of an interdealer quotation system (the OTC Service), has recently undertaken a primary surveillance role for the non-NASDAQ markets and, with Commission encouragement, has adopted a variety of rules and supervisory procedures for that purpose.[67] Among other things, NASD members desiring to publish quotations in the OTC Service or another interdealer quotation system must demonstrate compliance with Rule 15c2–11 by furnishing to the NASD, when applicable, the required paragraph (a)(5) information.

While the Commission believes that the requirements of paragraph (d) facilitate surveillance of activity in the non-NASDAQ market, it may be appropriate to eliminate paragraph (d) from the Rule if the piggyback exception is narrowed or repealed. For example, if the exception were repealed and paragraph (d) retained, substantial modifications of the provisions of paragraph (d) would be needed to avoid duplication in the furnishing of materials under that paragraph and related NASD rules. Accordingly, the Commission proposes to remove paragraph (d) from the Rule and thus give the NASD, subject to Commission oversight, greater leeway to determine how best to meet its surveillance objectives, avoid unnecessary duplication of filing burdens, and cooperate with private interdealer quotation systems.[68]

III. Solicitation of Comment

All interested persons are invited to submit written data, views, and arguments concerning the foregoing. The Commission notes that the proposed amendments to Rule 15c2–11 discussed above present questions as to the potential costs and benefits of their adoption. Commenters are therefore urged specifically to address those questions and to quantify their responses where possible.

To a significant extent, cost/benefit issues related to the proposed piggyback and repository amendments have been explored by the Commission on prior occasions.[69] In those instances, however, commenters, including market makers, did not have any actual experience with the operation of the amendments to the Rule incorporated in today's companion release concerning broker-dealers' record assembly and review responsibilities. Since the modification or elimination of the piggyback exception likely would result in an increase in the frequency with which broker-dealers would be required to comply with those responsibilities, the Commission would prefer that firms acquire such experience, over a period of several months, before presenting their views on the new proposals. Under the circumstances, the Commission is providing for the comment period to end January 1, 1992. The Commission specifically invites comment regarding any aspects of Rule 15c2–11, as amended in Release 34–29094, that would be insufficient, burdensome, or unnecessary if the amendments are adopted substantially as proposed or if the piggyback provisions were repealed completely.

The Commission also seeks comment on whether there are alternative regulatory approaches that would provide equivalent (or greater) benefits at lower costs to broker-dealers, issuers, quotation media, interested regulators, or public investors. The costs and benefits of any such alternatives should be explained and quantified to the extent feasible.

Persons desiring to make written submissions should submit three copies thereof to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, no later than January 1, 1992, and refer to file No. S7–9–91.

IV. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") in accordance with 5 U.S.C. 603 regarding the proposed amendments to Rule 15c2–11. The IRFA notes that the current piggyback provision can result in market makers unintentionally facilitating fraudulent schemes in that their introduction of quotations can add credibility to the illusion of a legitimate market for the securities involved. The IRFA states that narrowing or eliminating the piggyback exception, and extending the Rule's information gathering and review requirements to all participating market makers initiating or resuming quotations, would further the efficient valuation of non-NASDAQ securities and increase the likelihood that fraudulent schemes would be quickly exposed. The IRFA suggests, as an alternative to complete repeal of the piggyback exception, an approach that would permit broker-dealers who regularly quote non-NASDAQ securities to self-piggyback for one or more one-year periods. The Commission specifically seeks comments on any additional burdens on, or costs, to small broker-dealers and issuers associated with the elimination or significant modification of the piggyback exception.

In addition, the Commission seeks comment on the extent to which the proposed amendment encouraging the development of a central repository would reduce recordkeeping and other compliance costs. The IRFA notes that

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liberal piggyback criteria are satisfied is based on similar considerations. See paragraph (f)(3)(i) of the Rule.

[65] See paragraph (f)(2) of the Rule, as proposed to be amended, *infra*.

[66] The Bureau's surveillance role is summarized in Release 34–21914, 50 FR at 14112.

[67] See, *e.g.*, *supra* n.40.

[68] The Commission requests comment on whether it is necessary or appropriate to retain paragraph (d), in light of the NASD's initiatives regarding non-NASDAQ surveillance, even if the piggyback exception is retained in some form.

[69] See, *e.g.*, the 1989 Release and Release 34–21914.

the possible imposition of additional recordkeeping costs resulting from the proposed changes in the piggyback exception increases the desirability of creating a central database for information on non-NASDAQ issuers and their securities.

The IRFA notes that an additional amendment to the Rule, requiring broker-dealers to identify quotations which represent unsolicited customer indications of interest, continues the general industry practice and places no significant additional burden on small broker-dealers. It is also noted that eliminating the requirement to furnish certain information to an interdealer quotation system prior to publication of a quotation, should reduce recordkeeping and compliance costs for all broker-dealers since it would give the NASD greater flexibility to lessen the incidence of duplication in the furnishing of the information to interdealer quotation systems.

A copy of the Initial Regulatory Flexibility Analysis may be obtained by contacting Jodie J. Kelley, Division of Market Regulation, Securities and Exchange Commission, Washington, DC 20549, (202) 272–2848.

V. Effects on Competition

Section 23(a)(2) of the Exchange Act [70] requires the Commission, in adopting rules under the Exchange Act, to consider any anticompetitive effects of such rules and to balance these effects against the regulatory benefits gained in furthering the purposes of the Exchange Act. The Commission views, preliminarily, the proposed amendments to Rule 15c2–11 as causing no burden on competition unnecessary or inappropriate in furtherance of the purposes of the Exchange Act. The Commission, however, requests comment on any competitive burdens that might result from adoption of the proposed amendments described in this release.

VI. Statutory Basis

The rule amendments are being proposed pursuant to Sections 3, 10(b), 15(c), 15(g), 17(a), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78c, 78j(b), 78o(c), 78o(g), 78q(a), and 78w(a).

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

VII. Text of Proposed Rule Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations, is proposed to be amended as follows:

[70] 15 U.S.C. 78w(a)(2).

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 is amended by adding the following citation:

Authority: 15 U.S.C. 77c, 77d, 77s, 78c, 78d, 78i, 78j, 78l, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 79q, 79t, 80a–29, 80a–37, unless otherwise noted.

* * * * *

Section 240.15c2–11 also issued under 15 U.S.C. 78j(b), 78o(c), 78o(g), 78q(a), and 78w(a).

2. Section 240.15c2–11 is amended by redesignating paragraph (c) as (c)(1), adding paragraph (c)(2), removing paragraph (d), redesignating paragraphs (e) through (h) as (d) through (g), and revising newly designated paragraphs (e)(2) and (e)(3) to read as follows:

Note: Arrows indicate text proposed to be added. Brackets indicate text proposed to be removed.

§ 240.15c2–11 Initiation or resumption of quotations without specified information.

* * * * *

(c)>(1)< * * *

>(2) The broker or dealer need not have in its records the information described in this paragraph (a), or make information available to other persons in accordance with paragraph (a)(4) or (a)(5) of this section, to the extent that such information is reasonably available to the broker or dealer and such other persons from an entity designated by the Commission by rule, regulation, or order as a securities information repository. In determining whether to grant, deny, suspend, condition, or withdraw such a designation, the Commission will consider whether the repository:

(i) Collects information about a substantial segment of issuers of securities subject to this rule;

(ii) Maintains current and accurate information about such issuers;

(iii) Has effective acquisition, retrieval, and dissemination systems;

(iv) Places no inappropriate limits on the issuers from or about which it will accept information;

(v) Provides access to the documents deposited with it to anyone willing and able to pay the applicable fees;

(vi) Charges reasonable fees; and

(vii) In general, is so organized and has the capacity to be able reasonably to carry out the purposes of this section. <

* * * * *

(e) * * *

(2) The publication or submission by a broker or dealer, solely on behalf of a customer (other than a person acting as or for a dealer), of a quotation that represents the customer's indication of interest and does not involve the solicitation of the customer's interest; *Provided, however,* That [this paragraph (f)(2) shall not apply to a quotation consisting of both a bid and an offer, each of which is at a specified price, unless the quotation medium specifically identifies the quotation as representing such an unsolicited customer interest.] > no broker or dealer shall publish or submit for publication in an interdealer quotation system a quotation representing such an unsolicited customer interest unless the system specifically so identifies the quotation. <

(3)> The publication or submission by a broker or dealer, in an interdealer quotation system, of a quotation respecting a security which has been the subject of quotations by that broker or dealer in such a system on each of at least 12 days within the previous 30 calendar days and no more than 4 successive business days have elapsed during such 30-day period between published quotations of such broker or dealer for the security: *Provided,* That such broker or dealer has, at least once during the 12-month period prior to the publication or submission of the quotation, complied with the provisions of paragraph (a) of this section concerning the requirement to have and review specified records relating to the security. <

* * * * *

By the Commission.

Dated: April 17, 1991.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–9416 Filed 4–24–91; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 241

[Release No. 34–29093; File No. S7–8–91]

RIN: 3235–AE21

Penny Stock Disclosure Rules

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Commission is proposing for public comment Rule 3a51–1, Rules 15g–1 through 15g–7, and Schedule 15G to implement certain penny stock

provisions of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990. These rules define the term "penny stock" and provide certain exemptions. They also require broker-dealers selling penny stocks to their customers to provide the customers with: A risk disclosure document; monthly statements giving the market value of penny stocks held for the customer; disclosure of market quotations, if any; disclosure of the compensation of the broker-dealer and the salesperson in the trade; and disclosure when the broker-dealer is acting as sole market maker in the security.

DATES: Comments should be submitted by July 19, 1991.

ADDRESSES: Interested persons should submit three copies of their views to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth St. NW., Mail Stop 6-9, Washington, DC 20549, and should refer to File No. S7-8-91. All submissions will be available for public inspection at the Commission's Public Reference Branch, 450 Fifth St. NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert L.D. Colby, Chief Counsel; or Belinda Blaine, Attorney, (with respect to Rules 3a51-1 and 15g-1); Marie D'Aguanno Ito, Attorney, (with respect to Rules 15g-2 and 15g-3 and Schedule 15G); Alexander Dill, Attorney, (with respect to Rule 15g-4); or John Ramsay, Attorney, (with respect to Rules 15g-5, 15g-6, and 15g-7); all at 202-272-2844, Office of Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth St. NW., Mail Stop 5-1, Washington DC 20549.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

The Commission is proposing for public comment Rule 3a51-1 and Rules 15g-1 through 15g-7 under the Securities Exchange Act of 1934 ("Exchange Act") to implement certain provisions of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 ("Penny Stock Act"). The Penny Stock Act amends the Exchange Act by adding a new section 3(a)(51), which provides a general definition of "penny stock," subject to further definition by Commission rule, and section 15(g), which directs the Commission to adopt specific rules concerning broker-dealer disclosures to customers.

Rule 3a51-1—Definition of "Penny Stock"

Pursuant to section 3(a)(51) of the Exchange Act, proposed Rule 3a51-1 would further define the term "penny stock" to exclude certain additional types of equity securities. Proposed Rule 3a51-1 would exclude from the definition of penny stock securities that are "reported securities," *i.e.*, securities for which last sale reports are collected and made available pursuant to an effective transaction reporting plan. Generally, reported securities consist of New York Stock Exchange, Inc. ("NYSE"), American Stock Exchange, Inc. ("Amex"), and certain regional exchange-listed securities that meet NYSE or Amex listing standards. Reported securities also include securities quoted on the National Association of Securities Dealers, Inc.'s ("NASD") NASDAQ system that are designated as National Market System securities ("NASDAQ/NMS securities").

Proposed Rule 3a51-1 also would exclude from the definition of penny stock securities that have a price of five dollars or more (including any share of any unit that has an independent exercise price), as determined (a) on a per transaction basis or (b) on the basis of an exchange quotation or at least three *bona fide* interdealer bid quotations on an interdealer quotation system.

The proposed rule would further exclude from the definition of penny stock securities (i) issued by an investment company registered under the Investment Company Act of 1940, and (ii) that are put or call options issued by the Options Clearing Corporation.

Finally, proposed Rule 3a51-1 would exclude securities registered or approved for registration on a national securities exchange that has maintenance criteria authorizing, at a minimum, the delisting of a security whose issuer has less than $2,000,000 in net tangible assets or in stockholder equity.[1] This provision currently would exclude equity securities listed on the NYSE, the Amex, and the Chicago Board Options Exchange, Inc. ("CBOE"). Because the standards for being deemed a "reported security" are based on NYSE and Amex listing standards, this provision would not currently exclude any listed securities that are not already covered by the exclusions for reported securities or options issued by the Options Clearing Corporation. It would, however, allow an exchange to qualify for exclusion of its securities by raising its maintenance standards to the $2,000,000 level.

Proposed Rule 3a51-1 would establish similar maintenance criteria as the basis

[1] This provision implements the requirement in the Penny Stock Act that the Commission specify criteria for the exclusion from the definition of penny stock of equity securities listed on an exchange.

for excluding from the penny stock definition securities quoted or authorized for quotation on an automated quotation system. Because at this time the NASDAQ system does not satisfy these criteria, NASDAQ securities as a whole would not be excluded from the definition of penny stock. NASDAQ/NMS securities would be separately excluded from this definition.

Rule 15g–1—Exemptions

Pursuant to section 15(g)(4) of the Act, proposed Rule 15g–1 would exempt certain transactions from all of the proposed penny stock rules that require broker-dealer disclosures to customers, with the exception of proposed Rule 15g–7, which requires disclosure of sole market maker status. First, proposed Rule 15g–1 would exempt from proposed Rules 15g–2 through 15g–6 transactions in penny stocks by a broker-dealer that does less than five percent of its securities business in penny stocks and that has not been a market maker, during the past year, in the penny stock that is the subject of the transaction. Second, proposed Rule 15g–1 would exempt transactions in securities the issuer of which has net tangible assets in excess of $2,000,000, if that issuer has been in continuous operation for at least three years, or $5,000,000, if the issuer has been in continuous operation for less than three years. The net tangible assets standard must be demonstrated by current, audited financial statements that the broker-dealer has reviewed and has a reasonable basis for believing are accurate. Third, proposed Rule 15g–1 would exempt transactions in securities if the customer is an institutional accredited investor. Fourth, the proposed rule would exempt transactions that are not recommended by the broker-dealer. Finally, the proposed rule would exempt transactions in which the purchaser is the issuer of the penny stock that is the subject of the transaction.

Proposed Rule 15g–1 also would exempt specific transactions in penny stocks from proposed Rule 15g–2, which requires provision of a risk disclosure document, proposed Rule 15g–3, which requires disclosure of bid and ask prices, and proposed Rule 15g–6, which requires provision of monthly account statements. Rule 15g–1 would exempt from these proposed Rules transactions in securities:

(1) Registered or approved for registration, and executed on, a national securities exchange that makes transaction reports available pursuant to an effective transaction reporting plan; or

(2) Authorized, or approved for authorization, for quotation in the NASDAQ system, where the transaction is executed with or by a dealer registered as a NASDAQ market maker in the penny stock, a broker crossing two customer orders on an agency basis, or an underwriter or any syndicate or selling group member that is participating in a distribution of the penny stock that is the subject of the transaction.

Rule 15g–2—Risk Disclosure Document

Pursuant to section 15(g)(2) of the Exchange Act, proposed Rule 15g–2 would make it unlawful for a broker-dealer to effect transactions in penny stocks without first providing to the customer a standardized disclosure document as contained in proposed Schedule 15G. The document required by the proposed rule explains the risks of investing in penny stocks; important concepts associated with the penny stock market, such as the meaning of the "bid" and "ask" prices and the significance of the spread between those prices; the broker-dealer's duties to the customers, including disclosures required by each of the proposed rules; a toll-free telephone number through which a customer may inquire about the disciplinary history of a broker-dealer; the customer's rights and remedies in cases of fraud or abuse in connection with transactions in penny stocks; and other significant information of which the investor should be aware.

Rule 15g–3—Bid-Offer Quotations

Pursuant to section 15(g)(3)(A) (i) and (ii), proposed Rule 15g–3 would make it unlawful for a broker-dealer to effect a transaction in any penny stock without first disclosing and subsequently confirming to the customer current quotation prices or similar market information. For transactions effected on a principal basis, the broker-dealer must disclose its own bid and offer prices to a customer if the broker-dealer consistently has executed trades with other dealers at its quotations for the security over the past five business days, and if the broker-dealer believes that its present quotations accurately reflect the prices at which it is prepared to trade with other dealers. Otherwise, the dealer must disclose that it has not traded consistently at its quotes, and it must disclose the price at which it last purchased the penny stock from, or sold the penny stock to, another dealer in a *bona fide* transaction.

For transactions effected on an agency or riskless principal basis, the broker-dealer must disclose the best interdealer bid and offer prices for the penny stock that the broker-dealer obtains through reasonable diligence. For all such transactions in penny stocks, the broker-dealer must also disclose the number of shares to which the bid and offer prices apply.

Rule 15g–4—Broker-dealer Compensation

Pursuant to section 15(g)(3)(A)(iii) of the Exchange Act, proposed Rule 15g–4 would make it unlawful for a broker-dealer to effect a penny stock transaction for a customer unless the broker-dealer first discloses to the customer the amount of any compensation received in connection with that penny stock transaction. "Compensation" is defined in the proposed rule as:

(1) In the case of an agency transaction, the amount of any remuneration received or to be received from a customer in connection with the transaction;

(2) In the case of a "riskless principal" transaction, the difference between the price to the customer and the contemporaneous purchase or sale price; and

(3) Otherwise in the case of a principal transaction, the difference between the price to the customer and the prevailing market price in the security. This release contains a detailed discussion of the criteria to be used for determining "prevailing market price."

Rule 15g–5—Associated Person Compensation

Pursuant to section 15(g)(3)(A)(iii) of the Exchange Act, proposed Rule 15g–5 would make it unlawful for a broker-dealer to effect a transaction in any penny stock for a customer unless the broker-dealer first discloses and subsequently confirms to the customer:

(1) The aggregate or per share amount of cash compensation that the associated person of the broker-dealer has received or will receive from any source in connection with the transaction, in cases where the firm determines compensation on a transactional or per share basis; and

(2) The amount of cash or other compensation that the associated person has received from any source during the preceding calendar year in connection with all penny stock transactions, if this amount exceeds 25% of the total compensation that the associated person received during that year in connection with all securities transactions.

Rule 15g–6—Monthly Account Statements

Pursuant to section 15(g)(3)(B) of the Exchange Act, proposed Rule 15g–6 would make it unlawful for a broker-dealer that has effected a penny stock sale to a customer to fail to provide to that customer a monthly statement disclosing the identity and number of shares of each penny stock in the customer's account; the transaction dates; the purchase price; and the estimated market value of the security, based on the broker-dealer's recent purchase prices or recent dealer bids. The statement must also contain a standardized legend explaining the limited market for the securities and nature of an estimated market value in such a limited market. If the broker-dealer has not effected any penny stock transactions for the customer for six consecutive months, the rule would provide a limited exemption to permit account statements to be provided on a quarterly basis.

Rule 15g–7—Sole Market Makers

Pursuant to section 15(g)(5) of the Act, proposed Rule 15g–7 would make it unlawful for a broker-dealer that is the sole market maker in a penny stock, or an affiliated broker-dealer, to effect transactions in the stock unless the broker-dealer has disclosed to the customer that it or its affiliate is the sole market maker and that, by virtue of such status, it or its affiliate exercises substantial influence over the market for the security. Moreover, the proposed rule makes it unlawful for a broker-dealer that is a market maker in a penny stock or an affiliate to represent directly or indirectly to a customer that a transaction in the stock is being effected "at the market" or at a price related to the market unless the broker-dealer knows, or has reasonable grounds to believe, that a market exists outside of the broker-dealer's control.

II. Introduction

A. Origins and Nature of Penny Stock Fraud

The term "penny stock" generally refers to low-priced, speculative securities that are largely traded in the over-the-counter ("OTC") market.[2] The great majority of securities that are eligible for public trading in the United States are not traded on an established national securities exchange or the National Association of Securities Dealers Automated Quotation System ("NASDAQ").[3] Most of these non-NASDAQ, OTC securities are not actively traded in any forum, and frequently there is little public information available with respect to their issuers.

The historical origins of the penny stock market in the United States may be traced to a point as early as the 1880s, when speculation was fueled by gold mining expansion in Colorado. More recently, beginning in the 1950s and continuing until the early 1980s, substantial penny stock activity occurred periodically and was largely confined to parts of the western United States.[4] During this time span, periodic surges in penny stock sales typically were associated with "hot issues" activity occurring toward the end of advancing, or "bull," markets.[5]

Beginning in the mid-1980s, penny stock transactions and associated abuses grew geographically and in volume. Technological advances related to interstate telecommunications contributed substantially to this growth.[6] This period also witnessed a dramatic growth in the number of broker-dealers that concentrated their activities primarily or entirely in penny stock transactions.[7] In 1989, the Commission identified a corresponding increase in the number of investor complaints concerning these broker-dealers.[8] Government officials and commenters have stressed the threat posed by penny stock fraud to economic progress and the legitimate securities industry.[9] Penny stock fraud remains a serious national concern.[10]

In its report concerning the Penny Stock Reform Act of 1990,[11] the House Committee on Energy and Commerce (the "Committee") identified two primary factors spurring the growth of penny stock fraud: (i) A lack of public information concerning penny stocks, which facilitates price manipulation and deprives investors of a basis on which to make investment decisions, and (ii) the presence of a large number of individuals acting as promoters or associated with penny stock issuers or broker-dealers "who are repeat offenders of state or federal securities laws, other convicted felons, and persons having strong ties to organized crime." [12] With respect to recidivist

[2] For purposes of this section of this release, the term "penny stock" is used in this general sense. The Penny Stock Act added to the Exchange Act section 3(a)(51), which specifically defines the term "penny stock" and authorizes the Commission to designate or exempt certain classes of securities from the definition.

[3] The NASD stated in April 1990 that of the approximately 55,000 securities available for public trading, approximately 2,240 were listed on the New York Stock Exchange, 1,100 were listed on the American Stock Exchange, and 4,970 were listed on NASDAQ. *Penny Stock Fraud (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess., on H.R. 4497 (April 25, 1990) (the "1990 Hearing"), Statement of the NASD, at 136.

[4] House Comm. on Energy and Commerce, *Report to accompany the Penny Stock Reform Act of 1990*, H.R. Rep. No. 617, 101st Cong., 2d Sess. (July 23, 1990) (reporting H.R. 4497) (hereinafter "House Report"), at 9.

[5] *Fraud and Abuse in the "Hot Issues" and "Penny Stock" Markets: Hearing Before the Subcomm. on Securities of the House Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 1st Sess. (December 15, 1983) ("1983 Hearing"), 9–10, 12–13 (statement of John Shad, Chairman, Securities and Exchange Commission).

[6] House Report, at 9–10.

[7] See *The North American Securities Administrators Association Report on Fraud and Abuse in the Penny Stock Industry* (September 1989) (the "NASAA Report"), *reprinted in Penny Stock Market Fraud: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (August 21 and September 7, 1989) ("1989 Hearings"), at 149–244.

[8] Securities Exchange Act Release No. 27160 (August 22, 1989), 54 FR 35469 (adopting 15c2–6 under the Exchange Act) ("Rule 15c2–6 Adoption Release"), n.9, at 35469.

[9] A 1985 article, in discussing penny stock fraud and other investment scams, stated that "[t]he U.S. is in the grip of the most devastating epidemic of investment swindles and near-swindles in its history." R. Stern and L. Gubernick, *The Smarter They Are, the Harder They Fall*, Forbes (May 20, 1985), at 38. Commission Chairman Richard C. Breeden has called it an "economic crime." Statement of the Hon. Richard C. Breeden, Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 35 (April 25, 1990) ("Statement of Chairman Breeden"). A former Chairman of the Commission stated that penny stock fraud was "one of the most menacing problems facing investors, regulators, and the legitimate securities industry." Statement of the Hon. David S. Ruder, Before the Subcommittee on Telecommunications and Finance of the U.S. House Committee on Energy and Commerce, 7–8 (April 19, 1989). The United States Attorney General has cited penny stock speculation as one of the factors that has "marred the landscape of economic progress." Address of the Hon. Richard Thornburgh at the Tennessee Law Review Banquet Celebrating the Centennial of the University of Tennessee College of Law (March 10, 1990), *reprinted in* 57 Tenn. L. Rev. 499, 503 (Winter 1990). See generally, the NASAA Report.

[10] Although there is some evidence of a recent decline in the number of penny stock broker-dealers, this occurrence may reflect only temporary economic conditions. House Report 18; 1990 Hearing 142 (statement of the NASD). Nationwide telemarketing schemes continue to arise. For a recent example, see "'Operation Desert Scams' Nab Investors," *Wall Street Journal* (February 14, 1991), p. C–1, col. 1.

[11] The provisions of the Penny Stock Act pertaining to penny stocks were introduced as the Penny Stock Reform Act of 1990, H.R. 4497.

[12] House Report at 10. Concerning ties between penny stock fraud and organized crime, see Testimony of Lorenzo Formato, Convicted Former Broker and Participant in the Federal Witness Protection Program, 1989 Hearings at 101–122.

offenders, the Committee noted the limited classes of persons that the Commission had authority to bar from association with broker-dealers.[13]

Many of the abusive practices identified in the penny stock market can be attributed to the communication by broker-dealers to their customers of false or misleading information as to the value or market price of securities in order to induce transactions in those securities. These practices are more likely to flourish where there is a paucity of price, quotation, and other market information concerning a security. Where such information is available to investors, they have a greater ability to judge the veracity of sales agent claims.[14] Most penny stocks are not actively traded in any secondary market, and dealer quotations, if they exist at all, traditionally have been confined to the "pink sheets." [15] Moreover, pink sheet quotations generally do not serve as a reliable indication of the price at which a public customer could effect a purchase or sale transaction.[16]

Certain patterns, although not exclusive, have been characteristic of penny stock fraud in recent years. These patterns include: (i) Control of the market for the security by one or a few broker-dealers that often are related to the promoter or issuer; (ii) manipulation of prices through pre-arranged matching of purchases and sales and false or misleading press releases; (iii) "boiler-room" practices involving high-pressure sales tactics and unrealistic price projections by inexperienced salespersons; (iv) excessive and undisclosed bid-ask spreads and mark-ups by selling broker-dealers; and (v) the wholesale "dumping" of the same securities by promoters and broker-dealers after prices have been manipulated to desired levels, along with the resulting inevitable collapse of those prices and investor losses.[17] Broker-dealers involved in these schemes contact potential investors primarily through the use of "cold calls," *i.e.*, high volume telephone calls to strangers based on general lists, such as telephone directories.[18]

The growth of penny stock offerings and secondary market transactions also often has been associated with "blank check" offerings, or offerings of securities of an issuer that, at the time of the offering, has no specific stated business plan or purpose. Because of the absence of significant business or financial information at the time of the offering, the use of a blank check format by penny stock issuers, in addition to the lack of market information concerning penny stocks generally, may further facilitate the use of fraudulent sales and trading practices.[19]

The large-scale and persistent pattern of abuse described above represents a continuing threat to individual investors in particular and to investor confidence generally. Moreover, issuers themselves may in some cases be deceived by promoters who make unfounded promises of easy and efficient access to new capital.[20]

B. Regulatory Environment and Changes

In response to the serious problems involving penny stocks, during the last several years the Commission, together with other federal departments and agencies, the NASD, and state agencies have expanded penny stock investigations and enforcement actions and have adopted regulatory changes. In October 1988, the Commission formed its Penny Stock Task Force (the "Task Force"), consisting of representatives of each of the Commission's operating divisions and regional offices. The Task Force identified as its primary goals (i) increasing coordination and sharing of information with other regulators and with prosecutors, (ii) increasing enforcement activities and criminal referrals, where appropriate, (iii) targeting regulatory changes, and (iv) improving investor education.[21]

Following the formation of the Task Force, the Commission substantially increased the level of enforcement actions involving penny stock issuers and broker-dealers.[22] Many of these enforcement efforts have involved large, national penny stock firms, the activities of which have affected thousands of investors.[23] The Commission also has substantially assisted in the prosecution of actions by other federal agencies, state authorities, and the NASD.[24] The Commission has acted to promote investor education through the publication of consumer brochures,[25] which have been disseminated by the Commission directly and by other parties, including state authorities and certain public utilities.

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[13] House Report at 21. On the presence of recidivist offenders generally, see House Report at 20–22.

[14] As the Commission observed in the 15c2–6 Adoption Release: "[M]any low-priced securities are issued by smaller, little-known companies that may attract little attention outside that generated by a boiler-room sales campaign. Often these issuers are not subject to Exchange Act reporting requirements. The scarcity of information about the issuer is further aggravated by the lack of information on transactions in the issuers' securities. 54 FR at 35470."

The Commission and public commenters have long recognized the value of increased disclosure to investors in the over-the-counter market. In the 1940s, the Commission proposed a rule requiring dealers in over-the-counter trades to disclose to customers on trade confirmations the best independent bid and offer available in the market at the time of the trade. See Securities Exchange Act Release No. 3940 (April 2, 1947). In 1963, the Special Study of Securities Markets ("Special Study") recommended requiring confirmation disclosure of the best interdealer bid or offer at the time of the transaction and the prevailing interdealer spread. The Special Study also recommended that, prior to effecting a transaction, dealers notify customers if no independent market existed in the security or if interdealer quotation spreads in the security exceeded 20 percent. *Report of the Special Study of Securities Markets of the SEC* (1963), *reprinted in* H.R. Doc. No. 95, 88th Cong., 1st Sess. Part 2, 677 (1963). Subsequently, Rule 10b–10 [17 CFR 240.10b–10], the Commission's confirmation rule, was amended to add some additional disclosures. These disclosures included, among other things, the market maker status of a broker-dealer executing a transaction as principal in an equity security, the amount of odd-lot differential fees charged, and the amount of the mark-up or mark-down in connection with a riskless principal transaction in an equity security. Securities Exchange Act Release No. 15219 (October 6, 1978), 43 FR 47495. See generally, Simon and Colby, *The National Market System for Over-the-Counter Stocks*, 55 Geo. Wash. L. Rev. 17, 19–34 (1986).

[15] The National Daily Quotation Service, also known as the "pink sheets," is published and distributed nationally by the National Quotation Bureau, Inc. ("NQB") and, with the exception of the NASD's new OTC Bulletin Board, is the principal interdealer quotation system for equity securities that are not listed on an exchange or quoted on the NASDAQ system. Other quotation media are distributed in limited geographical areas, e.g., the Regional Inter-Dealer Over-the-Counter Stock Quotations prepared by Metro Data Company in Minneapolis, Minnesota (also known as the "white sheets"). The "pink sheets" and these other quotation media generally carry quotations for securities with limited distribution and trading activity. Quotations in these media often consist only of the name of the broker-dealer that has entered the quotation.

[16] See 1989 Hearings at 127 (statement of John C. Baldwin, President, North American Securities Administrators Association).

[17] 1989 Hearings at 50–51 (statement of Joseph I. Goldstein, Associate Director, Division of Enforcement, Securities and Exchange Commission ("Statement of Joseph Goldstein")).

[18] See Rule 15c2–6 Adoption Release, 54 FR at 35469; Securities Exchange Act Release No. 26529 (February 8, 1989), 54 FR 6693, 6694 ("Rule 15c2–6 Proposal Release").

[19] See House Report at 22–23.

[20] See 1989 Hearings at 86–89 (statement of Curt B. Cleaves, Chairman, Oregon State Bar, Securities Regulation Section).

[21] See Statement of Joseph Goldstein, 1989 Hearings at 51; House Report 16–17.

[22] See Statement of Chairman Breeden, 1990 Hearing at 31, 34.

[23] These firms include Blinder, Robinson & Co., Inc., Stuart-James & Co., F.D. Roberts Securities, Inc., Onnix Financial Group, Inc., and Thomas James Associates, Inc., among others. See House Report 13–16.

[24] Statement of Joseph Goldstein, at 51–55.

[25] U.S. Securities and Exchange Commission, *The New Penny Stock Cold Calling Rule, Information for Investors* (Dec. 1989); *Penny Stock Telephone Fraud, Information for Investors* (June 1989); and *Beware of Penny Stock Fraud! Information for Investors (Nov. 1988).*

During the last several years, the NASD also has substantially increased its examination and enforcement efforts with respect to penny stock firms.[26] At the same time, many states have increased substantially the staff and budgets of their securities agencies [27] and have enacted legislation directed to sales practice abuses or prohibiting or substantially restricting the use of blank check offerings.

In August 1989, the Commission adopted Rule 15c2–6.[28] Rule 15c2–6, which became effective on January 1, 1990, was designed to combat fraudulent and manipulative practices by broker-dealers relating to certain low-priced securities that are traded outside of an exchange or an automated OTC quotation system ("designated securities"). In general, unless one or more of the transactional exemptions provided by the rule is available, the rule makes it unlawful for a broker or dealer to sell to or cause the purchase of designated securities by any person unless the broker-dealer has specifically approved the purchaser's account for transactions in designated securities and has received the purchaser's written agreement to the transaction.[29]

In connection with the adoption of Rule 15c2–6, the Commission noted the connection between abusive sales practices and a lack of widely available information concerning secondary market activity in penny stocks.[30] Further, the Commission determined that regulatory action was warranted in light of continuing broker-dealer misconduct and the expenditure of considerable resources in investigating and prosecuting illegal activities involving penny stocks, which often are time-consuming and involve complicated evidentiary problems.[31] Moreover, the Commission recognized that issuer disclosure, the NASD's customer suitability rule,[32] and the general antifraud provisions of the federal securities laws [33] do not by themselves provide investors with sufficient protection against the abusive practices found in the penny stock market.[34]

Certain other recent initiatives by the Commission and the NASD affect broker-dealer sales practices in the penny stock market and the availability of market information to investors and regulators. The Commission has adopted amendments to Rule 15c2–11 under the Exchange Act,[35] which governs the submission and publication of quotations by brokers or dealers for securities that are not traded on an exchange or the NASDAQ system ("non-NASDAQ securities"). Rule 15c2–11 focuses on the fraudulent and manipulative potential of OTC quotations, which may be published not only to induce trading in a security, but also to establish an "apparent value." [36] These amendments require, among other things, that a broker or dealer review specified information before initiating or resuming quotes in a quotation medium and have a reasonable basis under the circumstances for believing that the information is accurate in all material respects and obtained from reliable sources.[37]

In May 1990, the Commission approved a rule change by the NASD to establish a one-year pilot program testing a new OTC Bulletin Board Display Service ("OTC Bulletin Board"), designed to allow market makers in non-NASDAQ securities to provide real-time quotation information, including indications of interest, concerning those securities on an electronic interdealer system.[38] Participation by market makers in the system is voluntary. Unlike quotations in NASDAQ, quotations entered in the OTC Bulletin Board need not be firm [39] and may be limited to bid or offer quotes only. Further, information contained in the system is not currently transmitted to market data vendors or wire services for newspaper publication.

Schedule H to the NASD Bylaws, adopted in 1988,[40] requires dealers in non-NASDAQ securities to report daily transaction volume to the NASD but not to the public.[41] The OTC Bulletin Board and Schedule H enhance surveillance efforts to identify fraudulent and manipulative conduct by broker-dealers involving non-NASDAQ securities.

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[26] See 1989 Hearings at 77–80 (statement of the NASD);1990 Hearing at 145–158 (statement of the NASD). These efforts have been facilitated by the Commission's approval of the NASD's proposal to remove the ceiling on fines, previously set at $15,000, for violations by member firms of its rules. Securities Exchange Act Release No. 25999, 53 FR 31948 (August 16, 1988).

[27] Statement of John C. Baldwin, *supra* n. 16, at 129.

[28] 17 CFR 240.15c2–6.

[29] Rule 15c2–6 defines designated securities to include any equity security other than a security (1) registered, or approved for registration upon notice of issuance, on a national securities exchange that makes transaction reports available pursuant to Rule 11Aa3–1 under the Exchange Act; (2) authorized, or approved for authorization upon notice of issuance, for quotation on the NASDAQ system; (3) issued by an investment company registered under the Investment Company Act of 1940; (4) that is a put option or call option issued by the Options Clearing Corporation; or (5) issued by an issuer that has net tangible assets in excess of $2 million, as demonstrated by certain financial statements that have been reviewed by the broker-dealer. For a more detailed discussion of the definition of "designated security," see Rule 15c2–6 Adoption Release, 54 FR 35472–75. Specific transactional exemptions apply to: (1) transactions in which the price of the security is five dollars or more; (2) transactions in which the purchaser is an accredited investor or an established customer of the broker-dealer; (3) transactions that are not recommended by the broker-dealer; and (4) transactions by a broker-dealer that is not a market maker in the designated security that is the subject of the transaction, and which derives not more than five percent of its total securities sales-related revenue from transactions in designated securities. The NASD, in notices to its members, has published certain interpretations of the Commission's staff concerning the rule and a model Customer Suitability Statement and Agreement to Purchase Form. NASD Notices to Members No. 90–18 (March 19, 1990) and No. 90–65 (October 1990) at 365–371.

[30] 54 FR at 35470.

[31] Rule 15c2–6 Proposal Release, 54 FR at 6694.

[32] NASD Rules of Fair Practice, Art. III, section 2, NASD Manual (CCH) ¶2152 provides that: "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."

[33] *E.g.*, section 12(2) of the Securities Act of 1933 (the "Securities Act") (imposing civil liabilities on persons offering or selling securities by means of fraudulent or misleading communications); section 17(a) of the Securities Act (making unlawful fraudulent practices related to the offer or sale of securities); and section 10(b) of the Exchange Act and Rule 10b–5 thereunder (making unlawful the use of manipulative and deceptive devices in connection with the purchase or sale of securities).

[34] Rule 15c2–6 Adoption Release, 54 FR at 35474; Rule15c2–6 Proposal Release, 54 FR at 6695–6. During March 1990, the Commission, the NASD, and the State of Florida conducted a special examination of penny stock broker-dealers in order to assess the level of compliance with the rule. See *Report By The Staff of The Securities and Exchange Commission On The Rule 15c2–6 Examination Sweep* (February 8, 1991). The monitoring of broker-dealer firms for compliance with Rule 15c2–6 is an integral part of the examination programs conducted by the Commission and the NASD.

[35] 17 CFR 240.15c2–11.

[36] See *Alessandrini & Co., Inc.*, 45 S.E.C. 399, 401(1973), *aff'd without opinion sub. nom. Budin* v. *SEC*, 506 F.2d 836 (2d Cir. 1974).

[37] Securities Exchange Act Release No. 29094, (April 17, 1991), also published in this issue of the **Federal Register.**

[38] Securities Exchange Act Release No. 27975 (May 1,1990), 55 FR 19124.

[39] The NASD has proposed to amend the system to require firm quotes. Securities Exchange Act Release No. 28946 (March 6, 1991), 56 FR 10932.

[40] Securities Exchange Act Release No. 25637 (May 2, 1988), 53 FR 16488.

[41] Members are required to report to the NASD on a daily basis, through an electronic price and volume reporting system, the highest price at which they sold and the lowest price at which they purchased any non-NASDAQ security, along with the total volume of shares purchased or sold. NASD Schedule to the Bylaws, Schedule H, § 2, NASD Manual (CCH) ¶1932–33 (1990). The NASD has proposed an amendment to Schedule H to remove the requirement that transactions in a security need be reported only where they exceed an aggregate daily volume of purchases or sales of either 50,000 shares or $10,000. Securities Exchange Act Release No. 28788 (January 16, 1991), 56 FR 2789.

III. Rules

A. General

The rules described in this release are being proposed by the Commission pursuant to the provisions of section 15(g) of the Exchange Act.[42] This section, which was added to the Exchange Act by section 505 of the Penny Stock Act, mandates specific measures to increase the level of disclosure to investors concerning penny stocks generally and specific penny stock transactions. In its report, the Committee stated:

> Because it is wrapped in secrecy and operates in relative obscurity, the penny stock market lends itself to manipulation far more easily than a market where information is readily available and circulated to investors. Penny stocks are often thinly traded and this more readily facilitates control and domination by a single market maker. The securities thus become attractive vehicles for manipulative, artificial schemes which are intended to raise the price or volume of the securities, primarily for the benefit of the few anonymous insiders, and frequently, the brokerage firm itself, which often unloads its own shares of the stock into the market after it has manipulated the price of the stock skyward.
>
> In the view of the Committee, the dearth of information in and about the penny stock market makes necessary the provisions in this legislation concerning the comprehensive new disclosure requirements for brokers and dealers in penny stocks * * *[43]

Section 503 of the Penny Stock Act added section 3(a)(51)[44] to the Exchange Act, which generally defines the term "penny stock" to include equity securities other than securities that are traded on exchanges or automated quotation systems meeting criteria established by the Commission, issued by registered investment companies, or otherwise excluded or exempted by the Commission based on price, net tangible assets, or other relevant criteria. Section 3(a)(51) also grants to the Commission certain additional authority to classify or exempt securities as penny stocks.

Under section 15(g)(1), it is unlawful for a broker or dealer to use the mails or other means of interstate commerce to effect, induce, or attempt to induce customer transactions in penny stocks except in accordance with the requirements of section 15(g) and the rules prescribed thereunder. In general, section 15(g): (i) Requires broker-dealers, prior to effecting a penny stock transaction, to provide to the customer a risk disclosure document that contains certain information describing the nature and level of risk in the penny stock market, the broker-dealer's duties to the customer, and the customer's rights and remedies for violations, as well as a narrative description of certain aspects of a dealer market generally, all in such form and containing such additional information as the Commission may require by rule; (ii) mandates that the Commission adopt rules relating to the disclosure, prior to each penny stock transaction and in the customer confirmation, of information concerning (A) price data, including bid and ask quotations, and the depth and liquidity of the market for particular securities and (B) the amount and a description of the compensation received by broker-dealers and their associated persons; (iii) calls for Commission rulemaking to require broker-dealers to provide for customers monthly account statements indicating the market value of the penny stocks in their accounts or indicating that the market value cannot be determined because of the unavailability of firm quotes; and (iv) provides the Commission with authority to adopt additional rules regarding disclosure by broker-dealers to their customers of information related to penny stock transactions.

Subsection 15(g)(4) provides the Commission with authority to exempt specific persons, or classes of persons, or transactions, or classes of transactions, from the requirements of section 15(g), consistent with the public interest and the protection of investors. Subsection 15(g)(5) grants to the Commission general rulemaking authority in order to carry out the purposes of the section or reasonably designed to prevent fraudulent, deceptive, or manipulative acts and practices with respect to penny stocks.

In addition to these broker-dealer disclosure requirements, the Penny Stock Act contains a number of other provisions involving penny stocks. Section 504 of the Penny Stock Act amended section 15(b)(6) of the Exchange Act[45] to provide to the Commission expanded authority to bar, suspend, censure, or place limitations on the activities of persons associated with or seeking to become associated with broker-dealers or other persons, such as promoters, who participate in a penny stock offering, where those persons have violated, or have been enjoined from violating, certain provisions of law. This provision addresses the Committee's determination that the Commission's sanctioning authority should be broad enough to encompass promoters, consultants, and similar participants in the penny stock market.[46] The Penny Stock Act also amended section 15A of the Exchange Act[47] to require every registered securities association to establish and maintain a toll-free telephone listing to receive public inquiries concerning broker-dealer disciplinary actions and to respond to those inquiries in writing.

In order to address the Committee's concern with the abuses often associated with blank check offerings, section 508 added to the Securities Act new subsection 7(b).[48] That subsection directs the Commission to adopt rules and regulations with respect to blank check offerings, which are defined as development stage companies that have no specific business plan or purpose or that intend to merge with an unidentified company or companies.[49]

In order to promote reliable and accurate market information concerning penny stocks, section 506 of the Penny Stock Act added new section 17B[50] to the Exchange Act to direct the Commission to facilitate the development of an automated quotation system to collect and disseminate reliable pricing and transaction information regarding penny stocks. The Commission believes that the NASD's OTC Bulletin Board is an important step in meeting this mandate, although the OTC Bulletin Board does not currently meet certain of the criteria, such as mandatory firm bid and ask quotations,[51] set forth in section 17B. The OTC Bulletin Board pilot period expires on May 31, 1991, and, in the context of reviewing an extension of the OTC Bulletin Board, the Commission will expect the NASD to address how the Bulletin Board may be further

[42] 15 U.S.C. 78*o*(g).

[43] House Report 20.

[44] 15 U.S.C. 78c(a)(51).

[45] 15 U.S.C. 78–*o*(b)(6).

[46] See section II.A. *supra*. Section 15(b)(6)(C) defines "person participating in an offering of penny stocks" to include "any person acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock," and such other activities as the Commission may determine.

[47] 15 U.S.C. 78*o*–3.

[48] 15 U.S.C. 77g(b).

[49] Pursuant to this directive, the Commission, by way of companion rulemaking, is proposing new rules under the Securities Act and the Exchange Act relating to registration statements filed by blank check companies offering penny stocks, including requirements to escrow securities issued and funds received in the offerings, and prohibiting the trading of securities that are held in escrow under these provisions. Securities Act Release No. 6891 (April 17, 1991), also published in this issue of the **Federal Register**.

[50] 15 U.S.C. 78q–2.

[51] The NASD has proposed to amend the system to require firm quotations. Securities Exchange Act Release No. 28946 (March 6, 1991), 56 FR 10932.

modified to meet section 17B's requirements.

Section 507 of the Penny Stock Act amended section 29(b) of the Exchange Act,[52] which controls the validity of contracts made in violation of the Exchange Act or the rules and regulations thereunder. The amendment provides that contracts made in violation of section 15(c)(2) of the Exchange Act or any rules adopted thereunder are void, except for such rules as the Commission by rule may specifically exempt from such application.[53]

B. Rule 3a51–1: Definition of Penny Stock

The Penny Stock Act added paragraph (51) to section 3(a) of the Exchange Act giving the Commission broad discretion to determine the scope of the securities covered under the Penny Stock Act. Section 3(a)(51)(A) defines the term "penny stock" as any equity security[54] other than a security that is (1) registered, or approved for registration, and traded on a national securities exchange that meets criteria prescribed by the Commission, (2) authorized for quotation on an automated quotation system sponsored by a registered securities association, if such system was established and in operation before January 1, 1990, and meets criteria prescribed by the Commission, (3) issued by an investment company registered under the Investment Company Act of 1940, or (4) excluded or exempted, on the basis of exceeding a minimum price, net tangible assets of the issuer, or other relevant criteria, from the definition of the term "penny stock" by rule or regulation prescribed by the Commission. This section determines both the extent of the Commission's authority under section 15(b)(6)(A) of the Exchange Act to censure, suspend, bar, or restrict the activities of persons participating in an offering of penny stock, and its authority to adopt rules under section 15(g) imposing additional broker-dealer disclosure requirements or other obligations with respect to penny stocks.

Pursuant to section 3(a)(51), the Commission is proposing Rule 3a51–1. Rule 3a51–1 generally would exclude from the definition of penny stock equity securities that are (1) reported securities, (2) put and call options issued by the Options Clearing Corporation, (3) priced at five dollars or more, or (4) registered on a national securities exchange or quoted on an automated quotation system that has specified maintenance listing criteria. The Commission also is proposing Rule 15g–1, which would exempt certain transactions from the disclosure requirements of Rules 15g–2 through 15g–6 under the Exchange Act. In proposing these rules, the Commission has considered the exclusions from the definition of "designated security" and the exempt transactions contained in Rule 15c2–6.[55] However, because the Penny Stock Act requires the Commission to conduct a separate and distinct analysis in defining the term "penny stock," and to identify independently transactions that are not likely to be the subject of manipulation,[56] the proposed definition of penny stock in Rule 3a51–1 and the transactions exempted under Rule 15g–1 are both broader and narrower in some respects than the analogous provisions of Rule 15c2–6.

1. Reported Securities

Paragraph (a) of proposed Rule 3a51–1 would exclude from the definition of penny stock any equity security that is a reported security—that is, any exchange-listed or NASDAQ security for which transaction reports are required to be made on a real-time basis pursuant to an effective transaction reporting plan.[57] As discussed above, many of the abuses occurring in the penny stock market are a direct result of the lack of publicly available information about the market in general and about the price and trading volume of particular penny stocks. Investors who lack access to this type of information are less able to make an informed investment decision, and thus are more susceptible to the manipulative sales practices of unscrupulous broker-dealers. In contrast, securities that are traded in a market that is subject to a comprehensive regulatory scheme requiring real-time transaction reporting and the extensive surveillance systems that this reporting supports, are less likely to be purchased or sold by means of manipulative sales tactics. Reported securities, in particular, are subject to a number of rules that promote efficient pricing and transaction execution procedures and mechanisms, and that generate public information for evaluation by professional securities analysts and the financial press.[58] These

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[52] 15 U.S.C. 78cc(b).

[53] The Penny Stock Act also substantially expands the Commission's administrative authority and civil enforcement powers. These provisions (the "remedies provisions") are not directly related to the penny stock provisions described above but will provide important new tools that the Commission can use to combat penny stock fraud and other violations of the federal securities laws. The remedies provisions were enacted to increase the deterrent effect of the Commission's enforcement actions and to provide the Commission with greater flexibility to fashion enforcement remedies in proportion to the seriousness of the violation. See Statement of Chairman Breeden, 1990 Hearing 36–44. See generally House Comm. on Energy and Commerce, *Report to accompany the Securities Law Enforcement Remedies Act of 1990*, H.R. Rep. No. 616, 101st Cong. 2d Sess. (July 23, 1990).

[54] The term "equity security" is defined in Section 3(a)(11) of the Exchange Act, 15 U.S.C. 78c(a)(11), as: "any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security."

Rule 3a11–1, 17 CFR 240.3a11–1, further defines "equity security" to include: "any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so."

[55] *See discussion of Rule 15c2–6, supra*, at section II.B. of this release. Unless otherwise indicated in this release, the Commission staff's interpretations of Rule 15c2–6 in part B of the NASD's Special Notice to Members No. 90–18 (March 19, 1990) ("NASD Notice") also would apply to any provisions of Rules 3a51–1 and 15g–1 that are the same as the provisions of Rule 15c2–6.

[56] See House Report at 27.

[57] 17 CFR 240.11Aa3–1(a)(4).

[58] For example, Rule 11Aa3–1 under the Exchange Act, 17 CFR 240.11Aa3–1, requires each exchange to file with the Commission, for approval, a transaction reporting plan concerning transactions by its members in reported securities effected through the facilities of the exchange. Each securities association is required to file a transaction reporting plan regarding transactions in reported securities by its members that are effected otherwise than through an exchange. The rule also provides for the collection and processing of transaction reports and last sale data and the consolidation of this information with similar information derived from other exchanges or national securities associations. Rule 11Ac1–1, 17 CFR 240.11Ac1–1, requires national securities exchanges or associations to establish and adopt procedures and mechanisms for collecting and processing bid, offer, and quotation size information for any reported security that is a "subject security," as defined in the rule, and for making this information available to quotation vendors. Members of an exchange or OTC market makers providing quotations in securities covered by the rule are obligated to communicate their bids, offers, and quotation sizes to their respective exchange or association. Subject to certain conditions, these broker-dealers also must execute transactions in such securities at a price at least as favorable as

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rules ensure that market information for reported securities is efficiently processed and disseminated to the public.

Reported securities also are required to meet strict listing criteria under the Restated Consolidated Tape Association Plan ("CTA Plan").[59] The CTA Plan generally provides that only securities that are registered or admitted to unlisted trading privileges on a national securities exchange and that satisfy NYSE or Amex original listing criteria, including such securities traded on a regional securities exchange, are reported securities.[60] In addition, only those securities quoted on NASDAQ that meet certain quantitative designation criteria are considered to be reported securities.[61] Accordingly, reported securities tend to represent issuers that have demonstrated an actual earnings history and potential and that have generated significant shareholder interest and acceptance. The Commission therefore proposes to exclude reported securities from the definition of penny stock because they are of a quality and are traded in a manner that make the protections provided by the Penny Stock Act less necessary.

Non-reported securities, such as securities that are quoted on NASDAQ but that are not designated as NMS securities, however, would be included within the definition of penny stock.[62] In the Rule 15c2–6 Adopting Release, the Commission recognized that, despite the protections afforded by quotation reporting and the surveillance systems operated by the NASD, sales practice abuses and manipulation similar to those in the non-NASDAQ OTC market also can occur in the market for non-NMS NASDAQ securities.[63] Since the adoption of Rule 15c2–6, the Commission has had the opportunity to monitor fraudulent sales practices in the NASDAQ markets. The Commission preliminarily believes that incidences of fraudulent activity involving low-priced non-NMS NASDAQ securities and other securities that are not subject to last sale reporting are sufficient to justify their inclusion in the definition of penny stock.[64] For instance, in attempting to generate substantial trading volume in low-priced stocks, broker-dealer representatives often make inflated claims concerning an issuer or the value of a security. Non-reported securities that are traded in the OTC market are particularly susceptible to such manipulation due to the lack of information regarding last sales and due to their low price.

The definition of penny stock also would include non-reported securities listed on a regional exchange. There is some indication that penny stock issuers and sponsors recently have listed securities on the regional exchanges to avoid the application of Rule 15c2–6. Notwithstanding these listings, virtually all of the trading volume in these securities has continued to occur in the OTC "pink sheet" market.[65] Thus, the Commission proposes to cover non-reported securities, including those securities listed on an exchange or quoted on NASDAQ, within the definition of penny stock.

By defining the term "penny stock" to include such low-priced non-reported securities, the Commission would retain the authority to bar certain persons, as described in section 15(b)(6)(A) of the Exchange Act, from participating in a wide range of low-priced securities offerings. Specifically, under section 15(b)(6)(A), the Commission would have the authority to prohibit any person subject to a Commission order barring or suspending that person from participating in a distribution of penny stock, as defined in Rule 3a51–1, from associating or seeking to become associated with a broker-dealer or from participating in a distribution of penny stock, without the consent of the Commission. Broker-dealers also would be prohibited under this section from participating in a distribution of penny stock without the Commission's consent if, in the exercise of reasonable care, they are aware of, or should have been aware of, the participation of a barred person.[66]

Proposed Rule 3a51–1 thus would give the Commission broader prescriptive authority to address problems of recidivism in penny stock offerings, including offerings of low-priced non-reported securities quoted on NASDAQ or registered on a regional securities exchange. Pursuant to section 15(g)(5) of the Exchange Act, it also would give the Commission general rulemaking authority with respect to those securities to promulgate any rules that are necessary or appropriate for the protection of investors or the maintenance of fair and orderly markets, or that are designed to prevent fraudulent or deceptive acts and practices. As discussed below, however, because quotations are available for securities quoted in the NASDAQ system or registered on a national exchange, proposed Rule 15g–1 would exempt transactions in these securities from Rule 15g–3, which requires broker-dealers to disclose quotations and other

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their communicated bids or offers, up to the amount of the communicated quotation size. For further discussion of transaction reporting, *see infra*, at section III.C.6. of this release.

[59] Securities Exchange Act Release No. 16983 (July 16, 1980), 45 FR 49414.

[60] As a general rule, the qualification standards of the NYSE require issuers to demonstrate that they have a total of 1,100,000 publicly-held shares and that the aggregate market value of those shares is $18,000,000. NYSE Rules, sec. 1 §§ 101.00–103.01, NYSE Guide (CCH) ¶¶ 2501–2606. Under the listing requirements of the Amex, issuers generally must have stockholders' equity of at least $4,000,000, and pre-tax income of at least $750,000 in the issuer's last fiscal year or in two of its last three fiscal years. Amex Rules, part 1 §§101–118, Amex Guide (CCH) ¶¶10,001–10,018. Apart from minimum numerical standards, both exchanges also will take other factors into consideration. For example, the Amex rules state that "[o]ther factors which will also be considered include the nature of a company's business, the market for its products, the reputation of its management, its historical record and pattern of growth, its financial integrity, its demonstrated earning power and its future outlook." Amex Rules, part 1 § 101, Amex Guide (CCH) ¶ 10,001.

[61] Issuers of these securities, which are known as NASDAQ/NMS securities, generally are required, among other things, to have either (1) $4,000,000 in net tangible assets and an annual pre-tax income of at least $750,000, or (2) $12,000,000 in net tangible assets and an operating history of three or more years. NASD Schedules to the By-Laws, Schedule D, pt. III, § 2 NASD Manual (CCH) ¶ 1809. See also the National Market System Securities Designation Plan With Respect To NASDAQ Securities, Securities Exchange Act Release Nos. 18399 (January 7, 1982), 47 FR 2228, and 22665 (November 26, 1985), 50 FR 49642.

In 1989, there were approximately 2,697 securities quoted on NASDAQ subject to last sale reporting. NASDAQ Fact Book (1990), at 44.

[62] According to the NASD, as of February 28, 1991, there were 2,097 non-NMS NASDAQ securities; of these securities, 837 were priced at less than five dollars and issued by an issuer with less than $2,000,000 in net tangible assets. The majority of these securities are securities that would have been subject to the requirements of Rule 15c2–6 if not for their quotation on NASDAQ.

[63] 54 FR at 35473.

[64] See, *e.g.*, *SEC* v. *Michael Kaufman*, Litigation Release No. 12425 (March 27, 1990); *SEC* v. *Novaferon Labs, Inc.*, Litigation Release No. 12745 (Dec. 21, 1990); *Cowen & Co.* v. *Merriam*, 745 F. Supp. 925 (S.D. N.Y. 1990); *Market Surveillance Committee* v. *Haas Securities Corp.*, No. MS–675 (NASD Nov. 25, 1988); *SEC* v. *James L. Condron*, Litigation Release No. 10687 (Feb. 25, 1985); *Alstead, Strangis & Dempsey, Inc.*, 47 S.E.C. 1034 (1984); and *SEC* v. *United Greenwood Explorations Ltd.*, Litigation Release No. 10131 (Sept. 23, 1983).

In connection with Rule 15c2–6, several commentators suggested that, due to the high risk of failure among certain minimally capitalized issuers, the protections provided by Rule 15c2–6 should apply to all transactions in securities issued by companies failing to meet a minimum level of net tangible assets, regardless of whether the securities are traded on an exchange or on NASDAQ. The Commission requests comment on whether Rule 3a51–1 should be more broadly drafted to include securities of issuers failing to meet specified financial standards.

[65] See, *e.g.*, D. Henriques, *The Latest Penny-Stock Shuffle*, The New York Times, April 1, 1990, sec. 3 at 1. For further discussion of exchange-listed and NASDAQ securities that are traded primarily in the OTC "pink sheet" market, see discussion, *infra*, at section III.C.6. of this release.

[66] See House Report at 28.

market information with respect to transactions in penny stocks, as well as Rules 15g–2 and 15g–6, which require broker-dealers to provide a risk disclosure document and account statements to purchasers of penny stocks. [67]

2. Price of the Security

As proposed, Rule 3a51–1 also would define penny stock to exclude securities that are priced at five dollars or more. For purposes of the rule, the price of a security in an agency transaction or a contemporaneous offsetting purchase and sale principal transaction [68] would be the price exclusive of any broker-dealer commission, commission equivalent, mark-up, or mark-down. In all other principal transactions, the price would be the price inclusive of the amount of the broker-dealer's mark-up or mark-down. [69]

In addition, paragraph (d)(1)(i) of the rule would provide that a security has a price of five dollars or more for a particular transaction if it is purchased or sold in a transaction at a price of five dollars or more. [70] Thus, the price of the security in an individual transaction will determine whether the security is a penny stock for purposes of that transaction. In the absence of a transaction, paragraph (d)(1)(ii) of the rule would provide that a security has a price of five dollars or more only if: (1) The average of at least three *bona fide* independent interdealer bid quotations at specified prices displayed in an interdealer quotation system [71] by market makers in the security to which the quotations apply is five dollars or more; or (2) a *bona fide* independent bid quotation published by a national securities exchange that makes transaction reports available pursuant to Rule 11Aa3–1 is five dollars or more. The purpose of paragraph (d)(1)(ii) is to allow persons to determine the price of a security if that security has not been or will not be purchased or sold in a particular transaction. [72] Because quotations for low-priced non-reported securities frequently are the subject of negotiation and may not accurately reflect the prevailing market price, the rule includes a condition that there be at least three *bona fide* independent bid quotations displayed in an interdealer quotation system at the time the determination whether the particular security is a penny stock is being made. These bid quotations may not be entered in the quotation system by broker-dealers acting in concert to circumvent the requirements of the rule. Alternatively, the rule would allow the five dollar price to be established by a *bona fide* bid quotation published by a transaction-reporting exchange. In the case of a unit composed of different securities, the price divided by the number of shares of the unit that are not warrants, options, rights, or similar securities, must be five dollars or more, as determined in accordance with paragraph (d)(1) of the rule, and the exercise price of any warrant, option, or right, as well as the conversion price of any convertible security, included in the unit must be five dollars or more. [73]

The five dollar figure, which is derived from Rule 15c2–6, is intended to include as penny stocks only those low-priced securities that, in the Commission's view, are the most susceptible to fraudulent sales practices. Although securities priced at any level can be the subject of market manipulation, broker-dealers frequently use securities selling for under five dollars, especially those trading at prices less than one dollar, in manipulative schemes due to the potential for rapid profits. For example, as the Commission noted in connection with Rule 15c2–6, "if a stock is quoted at five cents bid and ten cents asked, the spread, while only five cents in amount, constitutes a potential 100% profit per share to the broker-dealer." [74] In fact, if the market for a penny stock is dominated and controlled by a broker-dealer that sets an arbitrary price, the per share profit to the broker-dealer may be much higher than the actual spread. [75] In contrast, percentage price spreads in securities priced above five dollars generally are much lower. [76]

By setting the minimum price at five dollars, the proposed rule also is intended to avoid inhibiting legitimate small business capital formation. The five dollar figure is consistent with the Uniform Limited Offering Registration ("ULOR") project developed by the State Regulation of Securities Committee of the American Bar Association to provide a short-form registration procedure for small business private offerings. [77] Thus, small issuers may avoid the requirements of the Penny Stock Act by either adjusting their capital structure and pricing their securities at five dollars or more, or by relying on an exemption from the section 15(g) disclosure rules, described below.

3. Qualification Standards

Finally, paragraph (e) of proposed Rule 3a51–1 would exclude from the definition of penny stock any security that is registered, or approved for registration upon notice of issuance, on a national securities exchange that makes transaction reports available

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[67] For a discussion of these proposed rules, see *infra*, at sections III.D.—III.I. of this release.

[68] *I.e.*, transactions effected by a broker-dealer for a customer on a basis other than as a market maker in the security where, after having received an order from the customer to purchase the security the dealer effects the purchase from another person to offset a contemporaneous sale of the security to such customer, or, having received an order from the customer to sell the security, the dealer effects the sale to another person to offset a contemporaneous purchase from such customer.

[69] The Commission staff also has interpreted the five dollar price exemption with respect to principal transactions under Rule 15c2–6 to include mark-ups. See NASD Notice, Question No. 15. As in Rule 15c2–6, a broker-dealer would not be allowed under Rule 3a51–1(d) to charge an excessive mark-up in order to avoid the application of the penny stock rules.

Furthermore, information regarding broker-dealer mark-ups and mark-downs with respect to penny stocks traded under five dollars would be required to be disclosed to customers pursuant to proposed Rule 15g–4.

[70] Conversely, a security that is purchased or sold in a particular transaction at a price of less than five dollars, and that is not otherwise excluded from the definition, would be deemed to be a penny stock.

[71] Inter-dealer quotation system is defined in 17 CFR 240.15c2–7(c)(1) as "any system of general circulation to brokers and dealers which regularly disseminates quotations of identified brokers or dealers but shall not include a quotation sheet prepared and distributed by a broker or dealer in the regular course of his business and containing only quotations of such broker or dealer."

[72] For instance, promoters, consultants, or other associated persons of a broker-dealer or issuer that have been barred pursuant to section 15(b)(6) of the Exchange Act from participating in penny stock transactions may rely on paragraph (d)(1)(ii) to determine whether a particular security would be deemed to be a penny stock for purposes of section 15(b)(6).

[73] For example, a unit composed of five shares of common stock and five warrants would satisfy the requirements of this paragraph only if the unit price was twenty-five dollars or more, and the warrant exercise price was five dollars or more. Once the components of the unit begin trading separately on the secondary market, they must each be separately priced at five dollars or more.

Because interests in limited partnerships, real estate investment trusts, preferred stock, and certain types of asset-backed securities usually are priced at far more than five dollars, as a general rule, they also would be excluded from application of the penny stock rules under this provision.

[74] 54 FR at 35489. See also House Report at 12.

[75] See House Report at 11. In most cases, this practice would violate the antifraud provisions of the securities laws, such as Rule 10b–5 under the Exchange Act, 17 CFR 240.10b–5, as well as SRO rules of fair practice. See, e.g., NASD Rules of Fair Practice, Art. III, § 2 NASD Manual (CCH) ¶ 2152.

[76] See 54 FR at 35475.

[77] Specifically, ULOR provides a streamlined registration procedure for small businesses raising less than $1,000,000 in offerings exempt from registration under Rule 504 of Regulation D, 17 CFR 230.504. In order to prevent abuses in the secondary market in securities issued pursuant to ULOR, as a general rule, issuers may only apply for ULOR registration if the offering price of their common stock, or the exercise or conversion price of any warrants, options, rights, or convertible securities included in the offering, is more than five dollars. See 54 FR 35475.

pursuant to Rule 11Aa3–1,[78] and that, at a minimum, has the authority to delist or to withdraw a security from registration if the issuer's net tangible assets or stockholder equity falls below $2,000,000. Only securities that are actually traded on an exchange meeting these criteria would be excluded from the term "penny stock."[79] Currently, the maintenance criteria of the NYSE, the Amex, and the CBOE satisfy the requirements of the proposed rule.[80]

The maintenance criteria in paragraph (e) are derived from the criteria for reported securities set out in the CTA Plan.[81] Thus, the rule ensures that only registered securities representing companies that are a going concern, that have generated significant shareholder interest, and that are subject to certain Commission rules designed to prevent the types of abuses that typically occur in the penny stock market, would be excluded from the definition of penny stock. Although only a few national securities exchanges now qualify for this exclusion, the Commission believes the proposed maintenance criteria in paragraph (e) potentially would allow other securities exchanges to amend their maintenance standards to exclude their registered securities from the definition of penny stock if the requirements of the Penny Stock Act should prove a hindrance to trading in their securities.[82] The Commission also believes that these standards for exchange-listed securities are consistent with the statement in the House Report that "[t]he Committee expects the Commission to consider [real-time transaction reporting] plans in connection with any particular qualifying criteria the Commission may establish respecting the adequacy of reporting by exchanges for purposes of subparagraph (51)(A)."[83]

For the same reasons, paragraph (f) of Rule 3a51–1 would exclude any security that is authorized, or approved for authorization upon notice of issuance, for quotation in the NASDAQ system, provided that the system meets the same criteria. Although the maintenance criteria required by NASDAQ currently does not meet the Commission's proposed criteria, securities designated as NASDAQ/NMS securities would be excluded from the definition of penny stock pursuant to the exclusion in paragraph (a) for reported securities.[84]

C. Rule 15g–1: Exemptions from Proposed Rules

The Commission recognizes that, while the rules proposed pursuant to section 15(g) of the Exchange Act are directed at those low-priced securities that are the most susceptible to manipulative sales practices, the rules may affect legitimate small business capital formation. The Commission therefore is proposing Rule 15g–1, which would exempt certain transactions from the broker-dealer disclosure requirements of Rules 15g–2 through 15g–6.

1. Limited Broker-Dealer Activity in Penny Stocks

Section 15(g)(4) of the Exchange Act, which gives the Commission the authority to exempt any person or transactions from the rules adopted pursuant to section 15(g), requires the Commission to include an exemption for brokers-dealers that derive only an insignificant percentage of their total revenue from transactions in penny stocks. Accordingly, the Commission is proposing to exempt from Rules 15g–2 through 15g–6 transactions in penny stocks by broker-dealers that derive less than five percent of their total revenue from sales of penny stocks, except when they are acting as a market maker in the penny stock that is the subject of the transaction.[85] As with Rule 15c2–6, the Commission believes that making a market in a security creates an incentive for high pressure sales tactics, as well as an opportunity to manipulate the price of the security.[86] Therefore, regardless of their percentage of revenue from penny stock transactions, market makers in a penny stock would not be exempt under Rule 15g–1 with respect to that particular penny stock. Moreover, although this exemption is similar to paragraph (c)(4) of Rule 15c2–6, it is based on transactions in penny stocks, as defined in Rule 3a51–1, rather than transactions in "designated securities," as defined in Rule 15c2–6.[87]

2. Net Tangible Assets

Rule 15g–1(a) also would exempt from Rules 15g–2 through 15g–6 transactions in penny stocks issued by an issuer that meets minimum financial standards, as demonstrated by recent audited financial statements. Specifically, the rule would exempt an issuer that has been in continuous operation for at least three years if it has a minimum of $2,000,000 in net tangible assets. An issuer that has been in operation for less than three years must have net tangible assets in excess of $5,000,000 in order for the exemption to apply.[88]

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[78] 17 CFR 240.11Aa3–1.

[79] For further discussion of exchange-listed securities that are traded outside the parameters of the exchange, see discussion, *infra*, at section III.C.6. of this release.

[80] See NYSE Rules, sec. 8 § 802.00, NYSE Guide (CCH) ¶ 2565; Amex Rules, Part 10 § 1003, Amex Guide (CCH) ¶ 10,377; and CBOE Rules, ch. XXXI, Rule 31.94(C), CBOE Guide (CCH) ¶ 4094.

Because put and call options issued by the Options Clearing Corporation are already subject to special disclosure requirements, they are separately excluded from the definition of penny stock in paragraph (c) of Rule 3a51–1. See, *e.g.*, 17 CFR 240.9b–1; CBOE Rules, ch. IX, Rules 9.1–9.23, CBOE Guide (CCH) ¶ 2301–23; and NASD Rules of Fair Practice, appendix E, NASD Manual (CCH) ¶ 2164.

[81] In general, the CTA Plan incorporates the listing standards of the NYSE and the Amex. See discussion, *supra*, at section III.B.1. of this release.

[82] In order to qualify for this exclusion, the national securities exchange would be required to actually enforce either the $2,000,000 maintenance standard or a higher standard.

[83] House Report 28.

[84] The securities of approximately 3,350 publicly-traded corporations are listed on either the NYSE or the Amex. An additional 4,970 issues are quoted in the NASDAQ system; of these securities, approximately only one-half qualify as NASDAQ/NMS securities. See House Report at 8.

The NASD has filed a proposed rule change with the Commission pursuant to section 19(b) and Rule 19b–4 of the Exchange Act, to impose more stringent conditions for initial and continued inclusion of securities in the NASDAQ system. Pursuant to this proposal, a number of securities that are currently quoted, or that are eligible for quotation, in the NASDAQ system would become ineligible for continued quotation. See Securities Exchange Act Release Nos. 28391 (August 29, 1990), 55 FR 36372, 27908 (April 13, 1990), 55 FR 15052. These new conditions still would not satisfy the criteria for automated quotation systems proposed in Rule 3a51–1(f).

[85] Specifically, the rule would exempt transactions by a broker-dealer whose commissions, commission-equivalents, mark-ups, and mark-downs from transactions in penny stocks during each of the immediately preceding three months, and during eleven or more of the preceding twelve months, did not exceed five percent of its total commissions, commission equivalents, mark-ups, and mark-downs from transactions in securities during those months. A broker-dealer would have a ten-day period after the end of each month to determine whether it continued to meet the five percent sales-related revenue exemption. *Cf.* Letter from Robert L.D. Colby, Chief Counsel, Division of Market Regulation, SEC, to Michael W. Schley, Esq., Mahoney, Walling & Kelley (December 21, 1989).

[86] See 54 FR at 35477.

[87] Unlike proposed Rule 3a51–1, the definition of the term "designated security" in Rule 15c2–6 excludes any security that is registered on a national securities exchange that makes transaction reports available pursuant to Rule 11Aa3–1, that is authorized for quotation on NASDAQ, or whose issuer has net tangible assets in excess of $2,000,000. Although, as a general rule, low-priced securities are included within the definition of "designated security," transactions in securities priced at five dollars or more are exempt from Rule 15c2–6. For further discussion of Rule 15c2–6, see discussion at section II.B. of this release.

The Commission is considering amending Rule 15c2–6 to conform the scope of the rule to the penny stock rules promulgated under the Penny Stock Act. See discussion *infra*, at section IV of this release.

[88] In calculating the number of years in which it has been in operation, an issuer may "tack" on the period of time during which its predecessor remained in operation, provided that the issuer is a legitimate successor of that predecessor; that is, the business, ownership, and control of the issuer must

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This exemption is based on a similar provision in Rule 15c2–6 excluding any security whose issuer has net tangible assets of more than $2,000,000 from the definition of "designated security." [89] Unlike Rule 15c2–6, however, Rule 15g–1(a)(2) would impose a separate higher standard for issuers that have been in operation for less than three years in order to prevent start-up companies from inflating their assets or merging with companies with inflated assets to meet the minimum financial standards of the rule.[90] In particular, the two-tier standard is designed to prevent the types of abusive activities that have occurred both prior to and since the adoption of Rule 15c2–6 in August of 1989. For instance, it appears that some issuers have materially overstated their assets by falsely reporting fictitious items or receivables as assets. In other instances, broker-dealers have improperly subtracted intangible assets from total assets without reducing that amount by the issuers' outstanding liabilities. Start-up companies are particularly susceptible to these types of practices because they have little or no verifiable financial history. Therefore, in order to make more difficult similar abuses or evasions of Rule 15g–1, the Commission would retain Rule 15c2–6's $2,000,000 standard for companies in operation for over three years, but would increase the standard to $5,000,000 for companies that have a shorter or no operating history.[91]

The rule would further provide that, for domestic issuers, the required level of net tangible assets be demonstrated by financial statements dated less than fifteen months prior to the date of the transaction that have been audited and reported on by an independent accountant in accordance with Regulation S–K.[92] For foreign private issuers, the rule would require net tangible assets to be demonstrated by financial statements that are dated less than fifteen months prior to the date of the transaction, and that have been filed with the Commission or furnished to the Commission pursuant to Rule 12g3–2(b).[93] If the foreign private issuer has not been required to file or furnish financial statements during the previous fifteen months, however, the financial statements may be prepared and audited in compliance with generally accepted accounting principles of the country of incorporation and reported on by an accountant registered and in good standing in accordance with the regulations of that jurisdiction. [94] To demonstrate compliance with the rule, broker-dealers would be required to keep copies of the domestic or foreign issuer's financial statements for at least three years, the first two of which must be in an easily accessible place.[95]

In all cases, the broker-dealer must review the financial statements and have a reasonable basis for believing that they were accurate as of their date and that the issuer's financial condition has not substantially changed at the date of the transaction. Specifically, the broker-dealer must obtain audited financial statements from a reliable source, such as the issuer or the Commission, and review those statements to ensure that the issuer's assets less intangible assets and liabilities equals the amount required by the rule.[96] Ordinarily, if the issuer's audited statements show net tangible assets equaling either $2,000,000 or $5,000,000, depending on the number of years the issuer has been in operation, the broker-dealer will be entitled to rely on those statements to establish an exemption under the rule. Therefore, in most cases, the broker-dealer need not inquire about or conduct research with respect to any of the information contained in the issuer's financial statements. If, however, materially inconsistent or inaccurate information appears on the face of the financial statements, or if the broker-dealer becomes aware, in the course of its review, of material inconsistencies between the statements and information in the broker-dealer's possession, the broker-dealer may not claim an exemption based on those statements until it has satisfied itself that the information contained therein was accurate and complete as of the date of the financial statements and that the issuer's financial condition has not substantially changed.[97] The way in which the broker-dealer may satisfy itself as to the accuracy of an issuer's financial statements under the rule will vary according to the circumstances.[98] The rule, however, would not require the type of "due diligence" investigation typically required of an underwriter.

3. Institutional Accredited Investors

Paragraph (a) of Rule 15g–1 also would exempt transactions in which the customer is an institutional accredited investor, as defined in Regulation D of

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be closely related to that of its predecessor. A merger or other form of reorganization between two companies solely for the purpose of circumventing the requirements of the rule would not be considered a legitimate predecessor-successor relationship.

[89] 17 CFR 240.15c2–6(d)(2)(v).

[90] As a recent article noted, "[a]s soon as the cold-call rules went into effect, issuers and brokers found ways to circumvent them, including * * * mergers that would produce the required $2 million in assets." D. Henriques, *The Scam Goes On*, The New York Times Magazine, September 23, 1990, at 32. See also *Report by the staff of the Securities and Exchange Commission on the Rule 15c2–6 Examination Sweep* (February 8, 1991). The Commission's examination report states that in up to twelve percent of the examinations, a broker-dealer had incorrectly relied on the "designated security" definitional exclusion for issuers with more than $2,000,000 in net tangible assets. In addition, the examination report found that in many cases, "the broker-dealer had * * * subtracted intangible assets from total assets without reducing this amount by the issuer's outstanding liabilities." Examination report at 6, n.13. See also, generally, *United States* v. *John Robert Frascone*, Litigation Release No. 12666 (October 11, 1990); *SEC* v. *San Marino Securities, Inc.*, Securities Exchange Act Release No. 28487 (September 28, 1990), Examination report at 11; *SEC* v. *Wainwright, Austin, Stone & Co.*, Securities Exchange Act Release No. 28695 (December 13, 1990), Examination report at 12; *SEC* v. *Harry Schreiber*, Litigation Release No. 12216 (August 14, 1989); *United States* v. *Gleave*, Litigation Release No. 12024 (March 8, 1989); *SEC* v. *Intercontinental Technologies Corp.*, Litigation Release No. 10455 (July 12, 1984); and *SEC* v. *Wellshire Securities, Inc.*, 737 F. Supp. 251 (SDNY 1990).

In light of these practices, the Commission solicits comment on whether the $5,000,000 net tangible assets standard in proposed Rule 15g–1 should apply to all issuers, regardless of their number of years in business.

[91] A two-tier standard has been adopted in several other contexts involving issuer qualification standards. See, e.g., NASD Schedules to the By-Laws, Schedule D, pt. III, § 2 NASD Manual (CCH) ¶ 1809; and Amex Rules, part 10 § 1003, Amex Guide (CCH) ¶ 10,377.

[92] 17 CFR 210.2–02.

[93] 17 CFR 240.12g3–2(b). Securities Exchange Act Release No. 28889 (February 22, 1991), 56 FR 7424, provides a list of foreign issuers that have submitted the information required by Rule 12g3–2(b) to date.

[94] Although this language is derived from Rule 15c2–6, it has been amended to clarify that financial statements prepared in accordance with the accounting principles of a foreign jurisdiction will only be accepted if recent financial statements are not required to be and have not been filed with or furnished to the Commission.

[95] See 17 CFR 240.17a–4(b).

[96] The calculation would be the same as the calculation of net tangible book value under Item 506 of Regulation S–K, 17 CFR 229.506. The definition of intangible assets is addressed in Accounting Principles Board Opinion No. 17 (August, 1970).

[97] For further discussion of what constitutes a "reasonable basis for believing" that information is accurate, see Securities Exchange Act Release No. 29094 (April 17, 1991) (also published in this issue of the **Federal Register**), adopting amendments to Rule 15c2–11. This release discusses the types of "red flags" that generally should call into question information that has been provided to a broker-dealer. For instance, the release cites, as an example of a "red flag," financial statements of a development stage issuer that lists as the principal component of its net worth an asset that is wholly unrelated to the issuer's line of business.

[98] For example, the broker-dealer may directly question the issuer or its accountant. Under no circumstances, however, may the broker-dealer rely on information from any outside source, such as the issuer, to establish an exemption under the rule if the issuer's audited financial statements do not *clearly* indicate that the issuer had the required amount of net tangible assets at the date of the financial statements.

the Securities Act of 1933.[99] Thus, Rules 15g–2 through 15g–6 generally would not apply if the purchaser or seller of the penny stock is an institution, such as a bank, a registered broker-dealer, an employee benefit plan, a large corporation, or similar entity. These institutional investors usually invest in speculative equity securities only as part of a general business plan. As a result, they generally have a good understanding of the risks of investing in penny stocks. Moreover, in making investment decisions, these types of investors usually have the ability to obtain and evaluate independent information regarding penny stocks. They therefore are less susceptible to manipulative high pressure sales tactics and are less in need of the particular protections provided by proposed Rules 15g–2 through 15g–6.

Rules 15g–2 through 15g–6, however, would still apply to individual accredited investors.[100] Individual investors are more frequently the target of high pressure sales techniques because they present a better opportunity for sales of speculative equity securities. Given the nature of the penny stock market, the greater affluence of individual accredited investors provides little advantage in assessing the merits of penny stocks. These investors, for instance, often have few means of independently verifying the information provided by a penny stock broker-dealer.[101] As a result, they remain susceptible to abusive sales practices.

The penny stock disclosure rules are meant to benefit individual accredited investors by redressing this information imbalance. For example, many individual investors are unaware that the markets for a large number of penny stocks are dominated by a single market maker. Proposed Rule 15g–7 would require broker-dealers to disclose when they (or their affiliates) are acting as the sole market maker with respect to the penny stock that is the subject of the transaction and would prohibit market makers in a penny stock (or their affiliates) from making certain unwarranted representations about the price of the security. Rules 15g–2 through 15g–6 also would require broker-dealers to disclose other information that would assist an individual in making an informed investment decision, such as information regarding the risks involved in investing in the penny stock market, quotations and other relevant market information, and the amount of compensation received by the broker-dealer and any associated persons of the broker-dealer in connection with the penny stock transaction.[102]

4. Non-Recommended Transactions

As in Rule 15c2–6, Rule 15g–1(a) would exempt transactions in penny stocks that are not recommended by a broker-dealer. Investors who, on their own initiative and absent any recommendation from a broker-dealer, decide to purchase or sell a penny stock presumably are aware of and willing to assume the risks of trading in the penny stock market. Moreover, many of these investors have previous trading experience in penny stocks and knowledge of the business practices of their broker-dealers, and so are less in need of the protections provided by the rules.

The exemption in paragraph (a)(4) of the rule for non-recommended transactions generally is limited to situations in which a broker-dealer acts as an order taker for the customer, with little or no incentive to engage in manipulative sales tactics. It would not, for instance, apply to situations in which a broker-dealer brings a penny stock to the attention of an investor who subsequently purchases that penny stock, nor would it apply to situations in which the broker-dealer recommends a penny stock by sending promotional material through the mail directly to a particular investor.[103]

5. Issuer Repurchases

Finally, paragraph (a)(5) of Rule 15g–1 would exempt transactions by an issuer repurchasing or redeeming its own securities. Corporations generally repurchase their outstanding securities as part of a specific business plan.[104] For example, a corporation may decide to increase the earnings of its remaining shareholders by repurchasing some of its securities; or a corporation that is a party to a merger or sale of assets may

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[99] 17 CFR 230.501(a)(1), (2), (3), (7), or (8). Under these provisions, an "accredited investor" is defined as: "Any bank as defined in section 3(a)(2) of the [Securities] Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of $5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;"

"Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;"

"Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000;"

"Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in 230.506(b)(2)(ii); and"

"Any entity in which all of the equity owners are accredited investors."

For further discussion of the definition of accredited investor, see Securities Act Release No. 6825 (March 20, 1989), 54 FR 11369.

[100] In contrast to Rule 15c2–6, Rule 15g–1 would not exempt penny stock transactions in which the customer is: "Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;"

"Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000; or"

"Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year."

17 CFR 230.501(a)(4), (5), and (6).

However, an entity in which all of the equity owners are accredited investors, including any of the foregoing individual accredited investors, would be considered an exempt customer under Rule 15g–1. See 17 CFR 230.501(8).

[101] See, *e.g.*, *Hanly* v. *SEC*, 415 F.2d 589 (2nd Cir. 1969); and *SEC* v. *Great Lakes Equities Co.*, [Current] Fed. Sec. L. Rep. (CCH) ¶95,685, 98,206–7 (E.D. Mich. 1990), in which the court noted that: "[w]hen a company's securities are traded in the over-the-counter (OTC) market, the purchaser cannot easily verify the information provided by the registered representative. Therefore, the representative is under a special duty not to take advantage of the purchaser's lack of knowledge and must accurately represent his knowledge regarding the security. The sophistication of the customer as well as the amount of money lost by the customer are irrelevant factors in determining whether a violation by the broker or salesman has occurred."

[102] See discussion of proposed Rules 15g–2 through 15g–6, T3infra.T1 at sections III.D.—III.I. of this release.

[103] This exemption is similar to the exemption adopted in Rule 15c2–6. For a general discussion of "recommended" transactions, see 54 FR at 35477.

[104] In many states, the corporation's business plan must take into account corporation statutes that impose restraints on the repurchase of securities for the protection of shareholders and creditors. Delaware, for instance, prohibits the repurchase of common stock if it would impair capital. Del. Code Ann. tit. 8, § 160 (1983).

be required to purchase the securities of shareholders who exercise their appraisal rights. In addition, corporate issuers generally have access to information about the market for their own securities. Therefore, based on these considerations, the Commission believes that transactions in which the issuer of the penny stock is the purchaser of that stock should be exempt from proposed Rules 15g–2 through 15g–6.[105]

6. Exchange-Listed and NASDAQ Securities

In addition, paragraph (b) of Rule 15g–1 generally would exempt from Rules 15g–2, 15g–3, and 15g–6 any transaction in a penny stock that is registered, or approved for registration upon notice of issuance, on a national securities exchange that makes transaction reports available pursuant to Rule 11Aa3–1,[106] or that is authorized, or approved for authorization upon notice of issuance, for quotation on NASDAQ.[107] As proposed, Rules 15g–3 and 15g–6 would provide investors with market information that is relevant to their transactions in penny stocks, such as bid and offer prices, the number of shares to which these prices apply, and monthly statements of market value. Transactions in visible public markets, however, already provide such information to investors; that is, bid and ask quotations for penny stocks listed and traded on a national securities exchange are published by the exchange, and quotations for securities quoted on NASDAQ are entered into NASDAQ by market makers in the penny stock. Investors therefore have the ability to evaluate and monitor the market price of their penny stocks without having to rely exclusively on the representations of their broker-dealer. Furthermore, SRO rules impose certain restrictions on these quotations designed to protect investors. For example, under NASD rules, a market maker in a security is required to enter and maintain firm quotations that are reasonably related to the prevailing market price. The NASD has the authority to require a market maker to re-enter its quotations if it appears that they are no longer reasonably related to the prevailing market.[108]

The Commission believes that the availability of quotations and the protections of the SRO rules provide an adequate substitute for the disclosure requirements of proposed Rules 15g–3 and 15g–6. Accordingly, transactions in exchange-listed and NASDAQ securities would be exempt from Rules 15g–3 and 15g–6. In addition, in order to facilitate the initial execution of trades conducted through the facilities of an exchange or quoted on NASDAQ, Rule 15g–1(b) would exempt transactions in exchange-listed and NASDAQ securities from Rule 15g–2, which requires broker-dealers to provide customers with a risk disclosure document prior to effecting a trade in a penny stock.[109]

Transactions in a penny stock registered on a national securities exchange or quoted on NASDAQ, however, still would be subject to the requirements of proposed Rules 15g–4 and 15g–5.[110] Although the availability of price and volume information in these markets enhances the ability of investors to investigate the accuracy of their broker-dealer or salesperson's representations, it does not provide investors with comparable information regarding the broker-dealer's mark-ups or salesperson's compensation. For example, because market makers in a dominated market must calculate mark-ups on the basis of actual transactions, and not quotations, an investor may not be able to calculate the amount of remuneration that the broker-dealer will receive in a transaction from the quoted bid or offer price.[111] Furthermore, while Rule 10b–10 under the Exchange Act [112] currently requires a broker-dealer acting as an agent in a transaction to disclose in the confirmation of the transaction the amount of remuneration it received or that it will receive from the customer, the rule does not require the same disclosure with respect to principal transactions in non-reported securities. Rules 15g–4 and 15g–5 would supply this information by requiring broker-dealers to disclose the amount of compensation they receive in connection with any transaction in a penny stock (*i.e.*, a low-priced non-reported security),[113] as well as additional information regarding compensation paid to any associated person of the broker-dealer that has communicated with the customer with respect to that particular transaction. The Commission believes that, regardless of the market in which the penny stocks are traded, this information is relevant to an investor's decision to purchase or sell a penny stock. Thus, the proposed rule would provide an exemption only from Rules 15g–2, 15g–3, and 15g–6.

The exemption in paragraph (b) of Rule 15g–1 is further limited to penny stock transactions that are actually executed on a national securities exchange that makes transaction reports available pursuant to 17 CFR 240.11Aa3–1, or that are executed in NASDAQ securities with or by: (1) A dealer that is registered as a NASDAQ market maker in the penny stock that is the subject of the transaction, (2) a broker that is crossing two customer orders as agent, or (3) an underwriter or any member of a selling group that is participating in a distribution of the penny stock that is the subject of the transaction.

The exemption for exchange-listed and NASDAQ securities is premised on the availability of reliable quotation information resulting from full participation in those markets. Experience with Rule 15c2–6 has shown,

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[105] Transactions involving the shareholder selling the penny stock, however, would not be exempt under this provision.

[106] 17 CFR 240.11Aa3–1. Exchanges that currently qualify for this exemption are the NYSE, the Amex, the Boston Stock Exchange, the Cincinnati Stock Exchange, the Midwest Stock Exchange, the Pacific Stock Exchange, the Philadelphia Stock Exchange, and the CBOE, which was authorized to provide transaction reports for equity securities other than options in Securities Exchange Act Release No. 28808 (January 22, 1991), 56 FR 3124.

[107] Schedule D to the NASD's by-laws provides that a new issue offered on a firm commitment basis will be considered for inclusion in the NASDAQ system when the registration statement is declared effective by the Commission or other appropriate regulatory authority. Accordingly, if prior contingent approval has been received from the NASD, securities that are offered on a firm commitment basis will be considered to be "approved for authorization upon notice of issuance" in the NASDAQ system under Rule 15g–1(b) at the time the registration statement becomes effective, provided that the NASDAQ financial authorization criteria are satisfied at that time. A new issue offered on a best efforts basis, however, will be considered for inclusion under the NASD rules only upon the closing of the offering if the issuer is relying on the proceeds of the offering to satisfy the NASDAQ financial authorization criteria. Thus, securities underwritten on a best efforts or contingency basis will not be considered to be "approved for authorization upon notice of issuance" in the NASDAQ system if NASD approval is contingent in whole or in part upon the amount of proceeds raised by the offering. See NASD Schedules to the By-Laws, Schedule D, pt. II § 1, NASD Manual (CCH) ¶ 1803 (1990); and letter from Robert L.D. Colby, Chief Counsel, Division of Market Regulation, SEC, to Thomas Boyle, Esq., Krys, Boyle, Golz, Reich & Freedman (May 7, 1990) (Rechargeable Battery Corporation).

[108] NASD Schedules to the By-Laws, Schedule D, pt. VI, § 2 NASD Manual (CCH) ¶ 1818 (1990). See also NYSE Rules, Rules 60–62, NYSE Guide (CCH) ¶¶ 2060–2062.

[109] See discussion, *infra*, at sections III.D.—III.I. of this release.

[110] These transactions also would be subject to the requirements of proposed Rule 15g–7. See discussion, *infra*, at section III.C.8. of this release.

[111] See *Alstead, Strangis & Dempsey, Inc.*, 47 S.E.C. 1034 (1984), discussed *infra*, at section III.F. of this release.

[112] 17 CFR 240.10b–10(a)(7).

[113] Because transactions in exchange-listed penny stocks that are executed on an exchange are usually conducted on an agency basis, in most cases, Rule 15g–4 will not impose any additional disclosure obligations on broker-dealers beyond those already required by Rule 10b–10(a)(7). For further discussion of Rule 10b–10, see *infra*, at section III.F. of this release.

however, that some listed securities have been primarily traded in the non-NASDAQ OTC market by market makers availing themselves of the Rule 15c2–6 exclusion for exchange-listed securities.[114] Furthermore, it appears that in the NASDAQ market not all active market makers in NASDAQ penny stocks have been willing to enter quotes in NASDAQ for those securities, thereby depriving investors of firm quotations and other market information.[115] As the House Report stated:

> The Committee is aware that certain securities that should properly be categorized as penny stocks may be able to gain registration on regional exchanges. Once registered on an exchange, most of the trading activity in these securities may be directed to the non-NASDAQ over-the-counter market, where a lack of trading or quotation information, higher spreads and markups, and other factors may operate to the disadvantage of public investors. Similarly, the fact that a security is authorized for quotation on NASDAQ would not preclude a market maker in the security from effecting transactions in the security without entering quotations in NASDAQ. Therefore, if exchange registration or NASDAQ authorization provided a complete exemption from the penny stock definition, investors effecting transactions in these securities with dealers in the non-NASDAQ over-the-counter market could be disadvantaged.[116]

Consequently, the Commission is proposing to limit the exemption for exchange-listed securities to trades that are actually effected on an exchange, and to restrict the exemption for NASDAQ securities to agency cross transactions and transactions involving a NASDAQ market maker or an underwriter in an offering. By restricting the exemption to these specific transactions, Rule 15g–1(b) attempts to provide investors with the benefits of the disclosure rules where market information is not otherwise provided by current exchange or comprehensive NASDAQ quotations.

7. Exemptive Authority

Finally, the Commission would retain the authority to exempt any transaction or persons or class of persons from Rules 15g–2 through 15g–6 if the Commission determines that an exemption would be consistent with the public interest and the protection of investors.

8. Rule 15g–7

At this time, the Commission is not proposing to exempt any transactions from the requirements of proposed Rule 15g–7. Paragraph (a) of proposed Rule 15g–7 generally would require a broker-dealer to disclose when it (or its affiliate) is acting as the sole market maker with respect to a particular penny stock.[117] The Commission preliminarily believes that this information is relevant to all low-priced non-reported securities that fall within the definition of penny stock. An investor cannot make a truly informed investment decision regarding a penny stock without being aware that the broker-dealer selling the security or an affiliated broker-dealer is a sole market maker with respect to that security, and as such, exercises substantial influence over the market for the security.[118] In any case, paragraph (a) of the proposed rule would apply only to situations in which the broker-dealer is acting as a sole market maker in the penny stock that is the subject of the transaction (unless it is acting as a specialist on a national securities exchange). Paragraph (c) of the proposed rule, as discussed below, merely prohibits market makers and their affiliates from making unwarranted representations regarding the market price of a penny stock. The proposed rule therefore would not impose any requirements on broker-dealers beyond those already required by established principles of fair dealing.[119] Accordingly, as proposed, Rule 15g–7 generally would apply to all non-reported securities priced below five dollars. The Commission, however, requests comment on whether the rule should apply to transactions in which the customer is an institutional accredited investor, or whether proposed Rule 15g–1 should be amended to exempt those transactions from the requirements of Rule 15g–7.

9. Request for Comment

The Commission requests comment on whether the scope of the definition of penny stock and the coverage of proposed Rules 15g–2 through 15g–7 is appropriate. In that connection, the Commission seeks comment on whether proposed Rule 3a51–1 should be further restricted and whether the exemptions in proposed Rule 15g–1 should be expanded in order to reduce the potential impact of the rules on capital formation. Commentators specifically are requested to address whether the $2,000,000 maintenance listing standard in paragraphs (e) and (f) of Rule 3a51–1 should be lowered, or whether a different standard would more accurately reflect the purpose of the rule, as discussed above. In addition, comment is requested on whether individual accredited investors should be exempt from the proposed disclosure rules.

Conversely, the Commission solicits comment on whether any of the exclusions from the definition of penny stock or the exemptions provided in proposed Rule 15g–1 would provide an opportunity for unscrupulous broker-dealers to circumvent the disclosure requirements of Rules 15g–2 through 15g–6, or for persons with a disciplinary history to become involved, as promoters or other associated persons of a broker-dealer or issuer, in offerings of "penny stock." The Commission especially seeks comment on whether, in view of the general lack of accurate information regarding thinly-traded penny stocks, institutional accredited investors and individuals who seek to purchase or sell penny stocks on their own initiative would benefit from the additional disclosure provided by proposed Rules 15g–2 through 15g–6. Finally, the Commission requests

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[114] 17 CFR 240.15c2–6(d)(2)(i).

[115] In recognition of this problem, the NASD has proposed to amend Schedule H to its by-laws to encompass NASDAQ and regional exchange-listed securities that are primarily traded in the OTC market within the reporting requirements of Schedule H. Schedule H requires reporting of price and volume for principal transactions in "non-NASDAQ" securities, provided that certain conditions are met. A "non-NASDAQ security" currently is defined under section 1(a) of Schedule H as "any equity security that is neither included in the National Association of Securities Dealers Automated Quotations System nor traded on any national securities exchange." NASD Schedules to the By-Laws, Schedule H, § 1, NASD Manual (CCH) ¶ 1932 (1990). The NASD proposal expands the definition of "non-NASDAQ security" to include OTC transactions in securities listed on a regional exchange that do not meet primary exchange listing requirements, as well as OTC trades in NASDAQ securities by persons not registered as NASDAQ market makers in such securities. Securities Exchange Act Release Nos. 28788 (January 16, 1991), 56 FR 2789, 28932 (March 1, 1991), 56 FR 9991.

[116] House Report 27.

[117] For further discussion of Rule 15g–7, see *infra*, at section III.J. of this release.

[118] An investor should be aware, for example, that it is difficult to resell a penny stock in a market that is dominated by a single market maker.

[119] For instance, Rule 15c1–8, 17 CFR 240.15c1–8, generally prohibits a broker-dealer that is participating in a primary or secondary distribution of a security that is not traded on a national securities exchange from representing that the security is being offered at the market price, unless it has grounds for believing that a market for such security exists outside of the market created or controlled by the broker-dealer. In addition, as a general rule, a broker-dealer is obligated under the antifraud provisions of the Exchange Act to disclose when it is acting as a market maker in a security that is the subject of the transaction. See also *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2d Cir. 1970) (failure of broker-dealer to inform customer of possible conflict of interest due to the fact that broker-dealer was acting as a market maker in the securities that it recommended to the customer constituted an omission of material fact in violation of Rule 10b–5 under the Exchange Act).

comment on whether these rules should apply to all penny stocks (as defined in Rule 3a51–1), regardless of whether the issuer of the securities meets the financial standards set out in Rule 15g–1(a)(2).

D. Rule 15g–2: Penny Stock Risk Disclosure Document

1. Background

Section 15(g)(2) of the Exchange Act requires a broker-dealer to provide to each of its customers, prior to effecting any transaction in any penny stock, a document that discloses the risks of investing in the penny stock market. The statute enumerates the specific types of information that must be included in the disclosure document, namely: (a) A description of the nature and level of risk in investing in the penny stock market, both for public offerings and secondary trading; (b) a description of the broker-dealer's duties to the customer and the rights and remedies available to the customer when those duties are not upheld and when there are violations of the federal securities laws; (c) a brief, clear, narrative description of the dealer market, including a discussion of bid and ask prices, and the significance of the spread between the bid and ask prices; (d) a toll-free telephone number for inquiries on disciplinary actions of broker-dealers and their associated persons; (e) definitions of significant terms used in the document or in the conduct of trading penny stocks; and (f) other information that the Commission requires by rule. The statute also grants the Commission specific rule-making authority with respect to the language to be used in the risk disclosure document and with respect to the type-face and format of the document. [120]

In the past, broker-dealers conducting high-pressure sales of penny stocks have tended to provide customers with little or no reliable information about the penny stock market. Even if an investor can obtain information about the issuer of the securities being purchased through a prospectus, that investor may not have information about the market in the security being purchased. For example, the investor may not be aware that there is a limited market for the security and that the bid price is substantially below the price at which the customer purchased the security. Accordingly, unless the security were to increase substantially in price, it could only be sold at a substantial loss, or not at all, once purchased. The investor also may not be aware that the broker-dealer selling the securities is the only or primary market maker in the securities, and may be controlling the market.

In addition, many small investors in penny stocks are not sophisticated about the market in general. They may not understand the meaning or consequences of market domination, the function or purpose of bid-ask quotations, or the significance of a wide spread between these quotes. Yet such investors, lacking knowledge of the market and the risks involved in investing, have been induced to invest a significant portion of their savings in penny stocks. [121]

Moreover, although a customer may receive some information about the security purchased in a confirmation issued pursuant to Rule 10b–10 under the Exchange Act, these disclosures usually are received after an investment decision and a commitment of money have been made. Were basic risk and market information disclosed before the transaction, the customer may decide not to invest at all in the security, or to limit the dollar amount of the investment.

The Commission has long recognized the need for enhanced disclosure with respect both to issuers and the markets. Significant strides have been made, for example, with respect to disclosures in registration statements, required filings, and prospectuses by issuers of low-priced or speculative securities. [122] Moreover, general market information has become increasingly accessible, particularly with the advent of automated quotation systems and real-time reporting of transactions for a wide variety of securities. However, unlike issuer disclosures, basic information about the nature of the market for penny stocks, its depth and liquidity, and the risks of investing, is still not available as a matter of course to investors. In most cases, investors must simply rely on quotations provided by a broker-dealer. [123] This lack of active, current disclosure, particularly of the investment risks involved, has contributed to the persistence of fraud and abuse in the market for low-priced securities. The Commission preliminarily believes that enhanced market-related disclosures to investors, as required by the Penny Stock Act, would complement issuer-specific prospectus disclosures and would be another useful tool to combat penny stock fraud.

In accordance with section 15(g)(2) of the Exchange Act, the Commission is proposing for comment Rule 15g–2, which would require broker-dealers to distribute to customers, prior to a transaction in penny stocks, a brief, standardized document that identifies certain of the risks of investing in low-priced securities and explains basic concepts associated with the market for penny stocks. The proposed rule would make it unlawful for a broker or dealer to effect a transaction with or for the account of a customer unless the disclosure document has been furnished previously to the customer.

In practice, the broker-dealer probably would send the disclosure document to a potential customer through the mail after preliminary telephone contact; however, the document also could be provided to a potential investor in the course of a meeting, before the investor agrees to the penny stock trade. In any event, a broker-dealer would be obligated to ensure that each customer has received the document before effecting the first transaction in penny stocks with the customer. [124]

[120] See section 15(g)(2)(F) of the Exchange Act.

[121] See, e.g., 1989 Hearings at 249–51 (statement of William and Lily Lynes, who testified that they lost $13,000 through the inducements of a penny stock salesman, stating, "We were basically unsophisticated, inexperienced investors when we opened our accounts with Stuart-James * * *. We had no idea that there were any special risks associated with buying these 'penny' stocks that did not apply to most all other stocks as well * * *"). Also, see generally Rule 15c2–6 Adoption Release and the 1983 Hearing.

[122] In testimony before Congress, for example, former Chairman Shad discussed improvements in issuer risk disclosure with respect to speculative securities. He cited as an example typical issuer disclosure of risk factors in a Form S–18 filed with the Commission in 1983: "The Company has been recently organized, has not yet commenced commercial activities, has no revenue, earnings or operating history and is dependent upon the net proceeds of this offering in order to commence commercial operations." The registration statement for the company also stated: "The company currently has no full-time employees and even upon completion of this offering none of its four officers and directors will be devoting a significant portion of their time to the Company's day-to-day activities and affairs * * *. Accordingly, while the Company will attempt to solicit business through its officers and directors for its proposed endeavors, there can be no assurance as to the volume of business, if any, which the Company may succeed in obtaining, or that its proposed operations will prove to be profitable." 1983 Hearing at 17. See also *Report of the Securities and Exchange Commission Concerning the Hot Issues Markets* (1984) at 41–45 ("* * * obtaining adequate disclosure in prospectuses generally has not been a problem in connection with the hot issues markets. However, the extent to which disclosure documents are made available to investors and are considered by them in connection with the purchase of securities is an area of continuing concern." *Id.* at 45).

[123] Some quotations are available in the pink sheets or the OTC Bulletin Board.

[124] As described in section III.H., "effecting" in this context means at the time of agreement, oral or otherwise, to the terms of the transaction.

The actual text of the document is set forth in a schedule to the rule, Schedule 15G, entitled the "Penny Stock Disclosure Document." The document presents information required by each of the categories set forth in section 15(g)(2) of the Exchange Act. The document is designed to be brief and to catch the attention of readers by highlighting issues that demand investor caution and by explaining in short, simple paragraphs the nature of the market and the risks involved. The schedule also contains specific instructions, as detailed below, for reproduction by individual broker-dealers.

The document is divided into three parts The first part ("Risk Disclosure Section") informs investors that all of the disclosures made in the document are required by the Commission; provides a non-technical definition of "penny stock," based on the definition provided in section 3(a)(51) of the Act and proposed Rule 3a51–1; and identifies certain of the risks of investing in penny stocks.[125] The Risk Disclosure Section cautions against making a hurried investment decision and discusses the often speculative nature of penny stocks, the potential for significant losses, and the possibility that an issuer promoted in this market may have few assets and few prospects for business success. These cautionary comments were derived from earlier Commission materials concerning penny stocks,[126] and from the previous suggestions of individuals and organizations.[127]

Pursuant to paragraph 15(g)(2)(D) of the Act, the Risk Disclosure part of the document also will provide a toll-free telephone number operated by the NASD, so that investors can obtain information about the background and disciplinary history of the broker-dealers with whom they are dealing.[128] The NASD is in the process of establishing the toll-free number, in accordance with the terms of the Section 509 of the Penny Stock Act.

Finally, included in the first part of the document is a statement that the Commission has not approved or disapproved the securities being sold or offered for sale, and has not passed upon the fairness or merits of the transaction or the accuracy or adequacy of the information contained in any prospectus or provided by a broker-dealer.[129]

The second part of the document (the "Customer Rights Section") informs investors about their rights under the new penny stock rules, and explains in a non-technical manner the broker-dealer's duties, including the particular disclosures that must be made to them under each of the new penny stock rules.[130] The Customer Rights Section also informs the customer of the timing requirements for the disclosures to them under the proposed rules.

In addition, the Customer Rights Section discusses remedies available to customers who have been sold penny stocks in an unfair manner or in violation of the federal securities laws. The paragraph informs customers in a general way of their potential rights under section 29(b) of the Exchange Act, as amended by the Penny Stock Reform Act, which may allow a rescission of the purchase contract for broker-dealer transactions in violation, *inter alia*, of the rules under new section 15(g) of the Exchange Act. It informs customers of the availability of private litigation if they believe they have been defrauded or their rights otherwise have been violated, and the use of arbitration procedures, if such an agreement has been signed. It informs investors that they also can report their grievances to regulatory authorities, including the Commission, the NASD, and their state securities administrator.

The third part of the document ("Market Information Section") provides consumers with basic, topical information about the market for low-priced securities.[131] It begins with a general description of the non-NASDAQ market and an explanation of important concepts associated with that market, such as the role of brokers and dealers, the tendency of investors to rely heavily on a broker-dealer for information about low-priced securities, and the importance of learning about both the broker-dealer and the security before making a purchase of penny stocks. The next section describes the dealer market

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[125] Pursuant to sections 15(g)(2) (A) and (E) of the Exchange Act.

[126] See, e.g., U.S. Securities and Exchange Commission, *The New Penny Stock Cold Calling Rule, Information for Investors* (Dec. 1989), *Penny Stock Telephone Fraud, Information for Investors* (June 1989), and *Beware of Penny Stock Fraud! Information for Investors* (Nov. 1988) (collectively, "*Penny Stock Brochures*"). These brochures have been made available to investors through various means. Unlike the proposed risk disclosure document, these documents are not required to be distributed to customers before investing in penny stocks. See also, remarks of David S. Ruder, Chairman, U.S. Securities and Exchange Commission, Before the Twenty-First Annual Rocky Mountain State-Federal-Provincial Securities Conference, Denver, Colorado, Penny Stock Manipulation and the Small Investor, 14–15 (October 21, 1988) ("Ruder Remarks"); and 1983 Hearing at 30–32 (statement of John Shad, Chairman, and John Fedders, Director of the Division of Enforcement, Securities and Exchange Commission).

[127] See, e.g., NASAA Report at 80–83, and 1989 Hearings at 136–37 (statement of John Baldwin, President, NASAA). In Congressional testimony and its report, NASAA called for a risk disclosure document that contained at least the following: "an explanation that investment in penny stocks entails a high level of risk and that such investment should not be undertaken by any investor who is unprepared to accept the possible loss of all invested capital; a description of the risk factors unique to penny stocks in both initial public offerings and secondary trading; an explanation that when there are not at least three independent market makers for a stock, no reliable market exists; and a brief, clear description of the 'bid' and 'ask' method of market maker quotes for penny stocks and an explanation that price information on the penny stock may be available only through the brokers who are market makers in the stock." NASAA also suggested, *inter alia*, that broker-dealers be required to disclose their disciplinary history before opening a customer account. NASAA noted that such risk disclosure would be in line with the type of disclosure required for options trading. See Options Clearing Corporation, *Characteristics and Risks of Standardized Options* (1987).

See also, comment letters on proposed Rule 15c2–6, including letter from Robert Abrams, Attorney General, State of New York, to Jonathan Katz (May 18, 1989) (presenting specific suggestions for risk disclosures); letter from Robert M. Lam, Chairman, Pennsylvania Securities Commission, to Jonathan Katz (April 19, 1989); letter from James H. Cheek III and Sam Scott Miller, on behalf of the American Bar Association, Section on Corporation, Banking and Business Law, to Jonathan Katz (April 25, 1989) (calling for a standardized booklet describing pink sheet securities); letter from Hugh H. Makens, Warner, Norcross & Judd, to Jonathan Katz (April 12, 1989) (calling for a standardized disclosure document similar to the booklet available for options); letter from King Ranier, on behalf of Beaconsfield Securities, Inc., to Lynn Nellius, Corporate Secretary, NASD (March 7, 1989) (arguing that customers should sign a letter acknowledging awareness of certain risks associated with investing in penny stock). These letters are included in Commission File No. S7–3–89.

See also, 1990 Hearing at 129–30 (statement of Dee Benson, U.S. Attorney, Utah); 1989 Hearings at 43–45 (statement of Laurie Skillman, Securities Administrator, Oregon Department of Insurance and Finance); and 1983 Hearing at 48–49 (statement of Senator Alfonse D'Amato).

[128] In addition to the requirements under the new section 15(g)(2)(D) of the Exchange Act, Section 509 of the Penny Stock Act amends section 15A of the Exchange Act by requiring the NASD, within a year, to "establish and maintain a toll-free telephone listing to receive inquiries regarding disciplinary actions involving its members and their associated persons." Also pursuant to this section the NASD must respond promptly to such requests in writing and may charge persons other than individual investors reasonable fees for the written responses. The statute states, however, that the NASD will not have liability to any person for actions taken or omitted in good faith under this provision of the Act.

[129] Pursuant to section 15(g)(2)(F) of the Exchange Act. This proposed statement is similar to notices required by Rule 13e–3 under the Exchange Act (17 CFR 240.13e–3(e)(3)(ii) (A) and (B)), Item 431 of Regulation C under the Securities Act (17 CFR 230.481(b)(1)), and Item 501 of Regulation S–K under the Securities Act (17 CFR 229.501(c)(5)). See also, *e.g.*, Regulation A, 17 CFR 230.610a, Item 1, part (e), and Division I, Item 2, of Schedules A, B, C and D to Regulation B, 17 CFR 230.300–346.

[130] See sections 15(g)(2) (B) and (E) of the Exchange Act.

[131] This section reflects sections 15(g)(2) (C) and (E) of the Exchange Act.

and explains the concept of market domination. It also warns of the risks associated with a dominated market, such as arbitrary and non-competitive pricing of securities and the inability to resell securities purchased under such conditions.

The subsequent paragraphs of the section describe the function and significance of dealer mark-ups and mark-downs, bid and offer prices, the spread between the bid and offer prices, and initial public offerings.[131a] Unlike the market descriptions in the Consumer Rights Section, which are geared to the particular penny stock rule being proposed, the explanations in this section are of general application and are designed to provide basic guidance for the least sophisticated of investors. For this reason, each paragraph also provides warnings about how a market function may be abused and result in investor losses.

Finally, the document provides the address and telephone number of the Consumer Services Office of the Commission and the headquarters of the NASD, both of which can provide consumers with further information about penny stocks, or direct them to other offices within the Commission or the NASD that may provide more particular guidance.

In addition to the actual disclosure document, Schedule 15G contains a detailed set of instructions for reproduction of the document by the broker-dealer. The instructions set forth, for example, the criteria for type size and type-face, so that the document reproduced will be uniform among broker-dealers, and so that the type will be sufficiently large to be legible to the average reader.[132] Because the disclosure document is in standardized language, the schedule can be reproduced by photographic copying, so long as the copy is clear, complete, and meets the minimum type size requirements set forth for a printed reproduction. In addition, the instructions prohibit the broker-dealer from adding to, omitting, or altering the language or format of the disclosure document in any way and prohibit the broker-dealer from charging customers a fee for receipt of the document.

2. Request for Comment

The purpose of the proposed rule is to provide potential investors with information about the market for and risks of investing in low-priced, non-NASDAQ, over-the-counter securities, as well as information concerning the specific low-priced security being recommended or sold to a person who intends to purchase or sell a penny stock. The Commission hereby solicits comments on the proposed rule and, in particular, whether the language of Schedule G accurately and concisely communicates the information required by the Act.

E. Rule 15g–3: Broker-dealer Disclosure of Quotations and Other Information Relating to the Penny Stock Market

1. Background

Paragraphs 15(g)(3)(A) (i) and (ii) of the Exchange Act require the Commission to adopt rules requiring a broker-dealer to disclose to each of its customers, prior to effecting any transaction in, and at the time of confirming any transaction with respect to any penny stock, the bid and ask prices for such penny stock, and the number of shares to which such bid and ask prices apply. If this information is not available, the broker-dealer must disclose other comparable information relating to the depth and liquidity of the market for the stock. The Exchange Act also gives the Commission authority to define the nature and parameters of the bid-offer disclosures.[133] In accordance with the statutory mandate, and in light of the specific interpretive guidance provided by the legislative history of the provision,[134] the Commission is proposing Rule 15g–3. This rule would require broker-dealers to disclose to customers, in the time-frames discussed above, quotations derived from interdealer bid and offer prices, based on the capacity in which a given sale or purchase is being effected, *i.e.*, as principal, agent, or riskless principal.

Such disclosures would give customers a better understanding of the market in penny stocks, particularly the fair value of the stock, whether the market for the stock is active or inactive, and whether they will be able to have their orders executed in a timely manner. Moreover, investors will clearly see the bid and offer side of the market in the stock. Such information should contribute significantly to the mix of material information that an investor needs in determining whether a particular investment is worthwhile.

In adopting the bid-ask provisions of the Penny Stock Act, the Committee expressed concern that, despite required disclosure of bid-offer information, investors still might not be informed of the true prevailing market price for a penny stock. The House Report stated:

> While the Committee believes that the disclosure of bid and ask quotations to customers will provide an additional source of useful information for customers to assess the relative merits of a particular investment, the Committee notes that quotations for such securities frequently are the subject of negotiation and may not accurately reflect the actual price a customer would pay or receive for the securities; in other words, they may not reflect accurately the "prevailing market price."[135]

Even prior to the Penny Stock Act, there was widespread testimony about abuses in the dissemination of bid-offer prices by penny stock dealers.[136]

[131a] In addition to the requirements of sections 15(g)(2) (C) and (E) of the Exchange Act, section 15(g)(2)(A) requires discussion in the disclosure document of the risks of investing in penny stocks during their initial public offerings.

[132] The fonts required by the Schedule are consistent with those used for other documents required to be produced under the Securities Act and Exchange Act. See, *e.g.*, the printing instructions set forth in Regulation S–K under the Securities Act, 17 CFR 229.501(c)(5), and Rule 13e–3 under the Exchange Act, 17 CFR 240.13e–3(e)(3)(ii) (A) and (B).

[133] In this respect, paragraph 15(g)(3)(A)(i) of the Exchange Act states that the broker-dealer disclosures must take place "in accordance with such procedures and methods as the Commission may require consistent with the public interest and the protection of investors."

[134] See House Report at 29–30.

[135] *Id.* at 29. See also, *e.g.*, *Charles Hughes & Co., Inc.* v. *SEC*, 139 F.2d 434 (2d Cir.), *cert. denied*, 321 U.S. 786 (1943) (a broker-dealer's obligation to deal fairly with its customers includes an implied representation that the price charged bears a reasonable relationship to the prevailing market price); *In re Trost & Co.*, 12 S.E.C. 531, 535 (1942) (broker-dealer charging "unreasonable prices" in individual transactions as a basis for fraud); and *Ryan* v. *SEC*, Sec. Reg. & L. Rep. (BNA) No. 26, 1273 (July 1, 1983) (9th Cir. 1983), aff'g, *In re James E. Ryan*, 47 S.E.C. 759 (1982), (broker-dealer pricing that is "substantially different" from the prevailing market price, without disclosure of such, as a basis for fraud under Section 10(b) of the Exchange Act). For a discussion of the determination of prevailing market price, see the section of this Release pertaining to proposed Rule 15g–4 (broker-dealer compensation).

[136] See, *e.g.*, NASAA Report at 25 ("In the wake of the creation of the NASDAQ system in 1971, price information on many OTC stocks now appears in all major newspapers, allowing investors to track bid and ask quotations. However, this same information is almost entirely unavailable for pink sheet penny stocks, leaving the unwary investor at the mercy of whatever quotes are supplied by the broker-dealer, who * * * may be the only market maker trading in the stock."). The Report also states, "Manipulation of the spread between bid and ask prices also is commonplace in the penny stock market. Brokers often refuse to trade at the prices quoted in the pink sheets. Spreads often are extremely wide and appear to have little relation to rational factors, such as supply and demand, cost, and the level of risk. A number of instances have been reported in which customers of the same branch office have been provided over a matter of minutes and hours substantially different spread quotations." Id. at 39. See *also*, Statement of Joseph Goldstein, mentioning as a problem in the penny stock market "grossly inflated price spreads and sales prices that include undisclosed excessive mark-ups," and "the dumping of securities at inflated prices by the promoters or brokers who

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Individuals and organizations also urged Congress and the Commission to adopt provisions requiring broker-dealer disclosure of fair and accurate bid-ask quotations.[137] The Commission seeks to address these concerns by proposing a rule that would require a broker-dealer to disclose its bid or offer quotations when validated by current interdealer purchases or sales at those quotations. If the quotations cannot be validated in this manner, the broker-dealer must disclose that there have not been interdealer purchases or sales of the penny stock at the quotation prices with any consistency in recent days. Moreover, the broker-dealer must disclose the actual prices at which the broker or dealer itself had purchased the security from, or sold the security to, another dealer.

2. Summary of Proposed Rule 15g–3

For the reasons outlined above, paragraph (a) of proposed Rule 15g–3 states that it shall be unlawful for a broker or a dealer to effect a transaction in any penny stock with or for the account of a customer unless such broker or dealer discloses to such customer, in the time periods and manner provided by the Rule, the following information. For transactions effected with or for the account of a customer on a principal basis, paragraphs (a)(1) (i) and (ii) require a dealer to disclose its own bid and offer prices if, during the previous five days, the dealer consistently has effected *bona fide* sales to, in the case of an offer quotation, or purchases from, in the case of a bid quotation, other dealers at its respective bid or offer price at the time of those transactions. In addition, the dealer must reasonably believe in good faith at the time of the transaction with the customer that its respective bid or offer price accurately reflects the price at which it is willing to sell to or buy from other dealers.

Where the dealer's own bid and offer prices differ from its interdealer transaction prices over the previous five days, paragraph (a)(1)(iii) requires the dealer to disclose that it has not consistently effected interdealer purchases or sales of the penny stock at its bid or offer price. The dealer also must disclose to the customer the price at which it last purchased the penny stock from, or sold the penny stock to, respectively, another dealer in a *bona fide* transaction.

In order for a broker-dealer to use its own quotations under the proposed rule, the broker-dealer must have effected interdealer purchases or sales *consistently* at the quoted price over the previous five-day period. The broker-dealer would be responsible for showing that at least seventy-five percent of its *bona fide* interdealer purchase or sales transactions over the previous five days had been effected at the respective bid or offer quotations; otherwise, the broker-dealer must make the disclosures required by paragraph (a)(1)(iii) of the proposed rule.

Moreover, in reviewing the quotations disseminated by dealers under the rule, the Commission would consider carefully the nature of the interdealer transactions used by a dealer to validate its bid and offer quotations to a customer, to determine whether the interdealer transactions are *bona fide*. The Commission believes it is necessary to monitor the legitimacy of such interdealer transactions because of its experience with patterns of pre-arranged or otherwise artificial trading in the penny stock market.

When operating under paragraph (a)(1)(iii) of the proposed rule, the dealer must present, in a clear manner, the required disclosures regarding its last transactions and its lack of interdealer activity. The Commission believes that under such circumstances it generally would be misleading to customers for dealers to provide, in addition, their own purported market quotations. If the dealer nonetheless chooses to provide additional quotations, such quotations must be *bona fide*, and the dealer must communicate clearly the nature of those quotations, without rendering the required disclosures ineffectual.[138]

In the case of a sole market maker in a penny stock, the terms of paragraphs (a)(1) (i) and (ii) would apply to disclosure of the market maker's quotations, so that the quotations provided to the customer would be based on a minimum level of market activity. In other instances where a dealer has not effected transactions consistently with other dealers over a five-day period, as, for example, in the first few days of an initial public offering, a dealer would be required to use paragraph (a)(1)(iii) of the proposed rule, and disclose to the customer that it has not effected previous, consistent interdealer purchases or sales. In the case of an initial public offering, the broker-dealer can, of course, explain that no trading market existed prior to the offering. This information should indicate to the customer that the market for the securities is inactive or untested, in that an interdealer market has not yet been established for the securities.

With respect to transactions effected by a broker on an agency basis, or by a broker-dealer on a riskless principal basis, paragraph (a)(2) of the proposed Rule requires a broker-dealer to disclose the best independent interdealer bid and offer prices for the penny stock that the broker-dealer obtains through reasonable diligence. The Commission believes that the "reasonable diligence" test would require the broker-dealer acting as agent or riskless principal, at a minimum, to follow standards set forth by the NASD, and generally accepted as industry practice, by presenting to the customer the best of three quotations obtained from independent dealers in the security.[139]

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then move on to the next manipulation as stock prices collapse." 1989 Hearings at 51. See also statement of Laurie Skillman, Securities Administrator, Oregon, before the same subcommittee, id. at 45, ("The current system of weekly 'pink sheets' listing of bid and ask prices allows for abuse. There is no regulatory mechanism set up * * * to easily make a determination about the fair market value of a stock because the information is not provided instantaneously. The spread between the bid and ask price is a key to market manipulation, [sic] however, this information is difficult and cumbersome to obtain."); 1990 Hearing at 123–25 (statement of Dee Benson, U.S. Attorney, Utah) (discussing the manner in which bid-offer prices are manipulated upward through trading in nominee accounts); and House Report at 20.

[137] See, *e.g.*, NASAA Report at 82 and statements of John C. Baldwin, President, NASAA, 1989 Hearings at 136, and Susan Bryant, President, NASAA, 1990 Hearing at 100–101; letter from Robert Lam, Chairman, Pennsylvania Securities Commission, to Jonathan Katz, Secretary, SEC (April 19, 1989); letter from Hugh H. Makens, Warner, Norcross & Judd, to Jonathan Katz (April 12, 1989); and submission from Dennis Palkon, Ph.D., Associate Professor, Florida Atlantic University, to Jonathan Katz (April 3, 1989). See also 1989 Hearings at 110 (statement of Lorenzo Formato, convicted for involvement in penny stock schemes backed by organized crime, endorsing better bid-ask disclosures).

[138] When making such additional quotations under paragraph (a)(1)(iii) of the proposed rule, the dealer must, at a minimum, communicate clearly to the customer that the dealer has not consistently effected such interdealer purchases or sales at its bid or offer for the number of shares to which the bid and offer apply and that the dealer's quotations under these conditions are potentially unreliable.

[139] These standards are consistent with a broker-dealer's obligations under the "shingle theory," particularly its obligation to obtain best execution for its customers' orders. See, *e.g.*, N. Wolfson, R. Phillips & T. Russo, *Regulation of Brokers, Dealers and Securities Markets*, 2.10 at 2–51 (1977); Securities Exchange Act Release No. 13662 (June 23, 1977), 42 FR 33520; and L. Loss, *Fundamentals of Securities Regulation* 828 (2d ed. 1988). In addition, *cf.*, 17 CFR 240.11Ac1–2(a)(15), defining "best bid" and "best offer" for quotations in a reported security. See also Interpretation of the Board of Governors, NASD Manual (CCH) ¶2151.03 (regarding the obligation of members to obtain dealer quotations in connection with the execution of orders in non-NASDAQ, OTC securities).

Finally, paragraph (a)(3) of the proposed Rule requires broker-dealers to disclose the number of shares to which the bid and offer prices apply. This provision is consistent with paragraph 15(g)(3)(A)(ii) of the Exchange Act. In accordance with industry practice, the disclosure of shares would be in terms of round lots (typically, groups of one-hundred shares). However, the broker-dealer must take care in conversations with the customer not to let the size of the nominal quotation (*e.g.*, a quotation for one-hundred shares) mislead the customer with respect to that customer's actual cost in a transaction when the number of shares being purchased or sold differs from the volume to which the quotation pertains.[140]

3. Request for Comment

The purpose of the Proposed Rule is to provide investors with bid and offer prices of penny stocks based on *bona fide* interdealer purchases and sales. Such disclosures are intended to display the prevailing market prices for a security and to discourage arbitrary or unfair pricing by dealers. The Commission hereby solicits comments on the proposed rule, both in terms of its value to investors and its potential operational ramifications for broker-dealers. The Commission in particular requests comments on the adequacy and appropriateness of paragraph (a)(1)(iv) of the proposed rule, which states that "consistently" shall constitute at least seventy-five percent of a dealer's purchase or sales transactions during the previous five-day period.

F. Rule 15g–4: Compensation of Brokers or Dealers

1. Introduction

The Penny Stock Act requires the Commission to adopt a rule requiring disclosure of broker-dealer compensation both prior to effecting any transaction in, and at the time of confirming any transaction with respect to, any penny stock.[141] Congress was concerned that customers in the penny stock market have little notion of the often high compensation that broker-dealers obtain in penny stock transactions.[142] Broker-dealers are not currently required to disclose their compensation in penny stock transactions except in agency and "riskless principal" trades,[143] whereas the penny stock market is primarily a dealer market.

Large, undisclosed mark-ups and mark-downs[144] have been a particular problem in the penny stock market.[145] This market is often dominated by a single dealer or market maker and is thus characterized by the absence of liquidity or price competition.[146] The potential for large mark-ups and mark-downs for penny stock dealers has given rise to the related problems of high pressure sales practices, market manipulation, and other forms of fraudulent conduct.[147] In the Penny Stock Act, Congress has sought to combat these various abuses in part by requiring disclosure of broker-dealer compensation.

Rule 15g–4 as proposed requires disclosure of compensation of broker-dealers both prior to effecting a transaction in a penny stock, and at the time of confirming the transaction.[148] The rule, which defines compensation separately in agency, riskless principal, and dealer transactions, would require disclosure of broker-dealer compensation to any customer, but excludes from the definition of customer any broker or dealer, as such terms are defined under the Exchange Act.[149]

2. Definition of Compensation

Proposed Rule 15g–4 separates compensation of broker-dealers into three categories. First, the rule would define the compensation of a broker-dealer that is engaged in an agency transaction in a penny stock for a customer as the amount of any remuneration received or to be received by it from the customer. Compensation in agency transactions generally consists of a commission. As noted previously, the amount of remuneration to be received from the customer in agency transactions currently must be disclosed to the customer on the confirmation pursuant to Rule 10b–10(a)(7)(ii)[150] under the Exchange Act, and Rule 10b–10's general standard is used for agency transactions in Rule 15g–4.[151] Second, Rule 15g–4 would

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[140] In this context, the Commission believes that the anti-fraud provisions of the federal securities laws would prohibit the dealer from providing a quotation for a round lot of shares without further explanation if the broker-dealer is aware that this quotation in fact misleads the customer with respect to the value actually paid or received by the customer in a transaction resulting from such a quotation.

[141] Section 15(g)(3)(A) reads, in relevant part: "(3) Commission Rules Relating to Disclosure.—The Commission shall adopt rules setting forth additional standards for the disclosure by brokers and dealers to customers of information concerning transactions in penny stocks. Such rules—(A) shall require brokers and dealers to disclose to each customer, prior to effecting any transaction in, and at the time of confirming any transaction with respect to any penny stock, in accordance with such procedures and methods as the Commission may require consistent with the public interest and the protection of investors * * * the amount and a description of any compensation that the broker or dealer and the associated person thereof will receive or has received in connection with such transaction." 15 U.S.C. 78*o*(g)(3)(A).

[142] The House Report on the Penny Stock Act stated, in relevant part: "Penny stock schemes usually include undisclosed excessive markups (essentially, the difference between the prevailing market price and the sale price to the customer) of as much as 1000 percent. Instead of making money on commissions as full-service brokerages do, penny stock firms make substantial profit on the markups they charge. For example, a full-service brokerage might expect to make an $85 commission on a $4,000 sale. By comparison, a penny stock dealer may buy 20,000 shares of a stock for $2,000, sell it for $3,000 (a 50 percent markup), and make $1,000 profit." House Report 12.

[143] See paragraphs (a)(7)(ii) and (a)(8)(i)(A) of the Commission's Rule 10b–10 under the Exchange Act. See discussion *infra*.

[144] When a dealer as principal sells a security to a customer, it will include, as compensation, a mark-up over the prevailing market price. Similarly, when a dealer purchases a security from a customer, it will calculate a mark-down from the prevailing market price and effect the transaction at that lower price. In this release, the terms "mark-ups" and "mark-downs" will sometimes be used in lieu of "compensation" for purposes of greater clarity, but "mark-ups" and "mark-downs" are included in the meaning of "compensation" as defined under proposed Rule 15g–4.

[145] See, *e.g.*, *Handley Investment Co.* v. *SEC*, 354 F.2d 64 (10th Cir. 1965); *SEC* v. *Great Lakes Equities Co.*, [current] Fed. Sec. L. Rep. (CCH) ¶ 95,685, at 98,201 (E.D. Mich. September 4, 1990); *Financial Estate Planning*, Securities Exchange Act Release No. 14984 (July 21, 1978), 15 SEC Doc. 352.

[146] See, *e.g.*, *Hoxworth* v. *Blinder Robinson & Co., Inc.*, 903 F.2d 186 (3rd Cir. 1990); *Dale R. Dargie*, Securities Exchange Act Release No. 28785 (January 18, 1991), 47 SEC Doc. 2225; *Joe M. County*, Securities Exchange Act Release No. 28555 (October 19, 1990), 47 SEC Doc. 1043.

[147] Such fraudulent practices have included churning of customer accounts, selling to nominee accounts to inflate the prices of securities, selling by insiders at inflated prices, and making promotional statements that bear little or no relationship to the actual situation of the issuer. See NASAA Report. See also *SEC* v. *Great Lakes Equities Co.*, [current] Fed. Sec. L. Rep. (CCH) ¶ 95,685, at 98,201 (E.D. Mich. September 4, 1990); *First Pittsburgh Securities Corp.*, Securities Exchange Act Release No. 16897 (June 16, 1980), 20 SEC Doc. 401; *Mark E. O'Leary*, 43 S.E.C. 842 (1968).

[148] The timing and procedure of disclosure are discussed at section III. H. of this release.

[149] 15 U.S.C. 78c(a) (4), (5).

[150] 17 CFR 240.10b–10(a)(7)(ii).

[151] See paragraph (c)(1)(i) of the proposed rule. A separate paragraph of Rule 10b–10, paragraph (a)(7)(iii), currently requires that the broker-dealer also inform the customer on the confirmation of the amount of remuneration received in connection with the trade from any other person, but generally allows the broker-dealer only to inform the customer whether such remuneration has been received and that the details are available on request. In a different context, the Midwest Stock Exchange, Inc. has petitioned the Commission to adopt rules to provide disclosure of the practice of "payment for order flow," which is prevalent in sections of the OTC market. Letter from J. Craig Long, Vice President, General Counsel and Secretary, Midwest Stock Exchange, to Jonathan Katz, Secretary, Securities and Exchange Commission (May 21, 1990). The NASD separately has submitted a rule filing to the Commission that would require NASD members to include further

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define compensation of a broker-dealer, including a market maker, that executes a "riskless principal" transaction in a penny stock as the difference between the price to the customer and the contemporaneous purchase or sale that is made in connection with such transaction. A riskless principal transaction is a transaction in which a broker-dealer, after receiving (or receiving the commitment for) a buy or sell order from its customer, makes a purchase or sale of the penny stock as principal from or to another person to offset the sale or purchase from or to such customer. Because riskless principal transactions do not involve holding securities in inventory for any appreciable length of time, the calculation of a broker-dealer's compensation in such transactions is relatively straightforward.[152]

Third, Rule 15g–4 would define compensation of a broker-dealer that executes principal transactions, other than riskless principal transactions, as the difference between the price to the customer charged by the dealer and the prevailing market price. Calculation of compensation in this third category of principal transactions, in which the broker-dealer purchases or sells for its own account, must account for the often illiquid or noncompetitive nature of the penny stock market. Through administrative and judicial proceedings, the Commission has maintained the long-standing position that undisclosed excessive mark-ups and mark-downs violate the antifraud provisions of the federal securities laws,[153] and has set forth the appropriate methods for calculating broker-dealer mark-ups. In addition, since 1943, the NASD has deemed it inconsistent with just and equitable principles of trade under its Rules of Fair Practice for a member to enter into any securities transaction with a customer at a price not reasonably related to the current price of the security.[154]

The Commission and the courts consistently have held in mark-up cases that, absent countervailing evidence, the prevailing market price is the price paid by a dealer in actual contemporaneous transactions with other dealers.[155] This standard, and a variation for certain dealer transactions, has been described most succinctly in the Commission's 1984 decision in *Alstead, Strangis & Dempsey, Inc. ("Alstead")*,[156] which Congress, in its House Report on the Penny Stock Act, endorsed as the "leading case" establishing the principles for calculating mark-ups.[157] The standards under *Alstead* as summarized in this release are intended to provide a framework for broker-dealers to use in calculating compensation when acting as principal in transactions in penny stocks. Broker-dealers are encouraged to refer to that case in conjunction with this release for a statement of the Commission's standards regarding calculation of compensation.

The Commission in *Alstead* first reiterated the general contemporaneous cost standard. In one of the situations presented by the case, several market makers in an equity security were listed in the "pink sheets," and the firm in question, Alstead, Dempsey & Co., also entered quotations in regional interdealer quotation sheets. Nonetheless, the Commission held that except for the prices Alstead, Dempsey & Co. charged another dealer in two transactions, the best evidence of prevailing market price was the price paid by Alstead, Dempsey & Co. in contemporaneous transactions, in view of the unreliability of Alstead, Dempsey & Co.'s offer quote.[158]

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explanation of their remuneration received in return for order flow. Securities Exchange Act Release No. 28020 (May 15, 1990), 55 FR 21284, as amended in Securities Exchange Act Release No. 28774 (January 14, 1991), 56 FR 2573. In view of the pendency of these initiatives, the Commission is not proposing at this time to require in Rule 15g–4 disclosure of additional compensation received from others. Nonetheless, the Commission requests comment whether this form of additional compensation should be covered by the rule.

[152] Rule 10b–10 requires broker-dealers, other than market makers, that execute riskless principal trades in equity securities to disclose the amount of any mark-up, mark-down, or similar remuneration received in the transaction. The Commission believes that Rule 15g–4 provides a clearer articulation of this requirement for riskless principal transactions and requests comment whether Rule 10b–10(a)(8)(i)(A) should be amended to conform to this language.

The determination whether a dealer makes a *bona fide* purchase or sale of penny stock that can properly be characterized as an off-setting riskless principal transaction, the compensation for which would thereby come within the definition of compensation for riskless trades under Rule 15g–4(d)(2), can only be established on a case-by-case basis.

[153] The Commission and the courts have stated for over 50 years that a broker-dealer, by holding itself out as a securities professional with special knowledge and ability, impliedly represents that it will deal fairly, honestly, and in accordance with industry standards with the public investor. "[A] dealer may not exploit the ignorance of his customer to extract unreasonable profits resulting from a price which bears no reasonable relation to the prevailing market price." *Duker* v. *Duker*, 6 S.E.C. 386, 389 (1939). Specifically, a broker-dealer impliedly represents that the prices it charges bear a reasonable relation to the prevailing market price, and any excessive mark-up is inconsistent with that implied representation. Under this theory, the courts have found violations of section 17(a) of the Securities Act, 15 U.S.C. 77q(a), and section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b–5 thereunder, 17 CFR 240.10b–5. See generally *Charles Hughes & Co.* v. *SEC*, 139 F.2d 434 (2d Cir.), *cert. denied*, 321 U.S. 786 (1943); *SEC* v. *Great Lakes Equities Co.*, [current] Fed. Sec. L. Rep. (CCH) ¶95,685, at 98,201 (E.D. Mich. September 4, 1990); *Trost & Co., Inc.*, 12 S.E.C. 531 (1942).

[154] Interpretation of the Board of Governors, NASD Manual (CCH) ¶2154, at 2056. The NASD generally will consider mark-ups and mark-downs on equity securities greater than five percent above the prevailing market price to be unfair or unreasonable. However, the determination of the fairness of mark-ups and mark-downs must be based on a consideration of all the relevant factors, of which the percentage is only one. *Id.* at 2055, 2057. See *Gerald M. Greenberg*, 40 S.E.C. 133, 136–37 (1960).

The Commission consistently has held that undisclosed mark-ups and mark-downs of more than ten percent are fraudulent in equity securities. See, *e.g., Peter J. Kisch*, 47 S.E.C. 802, 808 (1982); *Staten Securities Corp.*, 47 S.E.C. 766, 767 (1982); *Powell & Assocs.*, 47 S.E.C. 746, 748 (1982); *Charles Michael West*, 47 S.E.C. 39, 42 n.12 (1979). The Commission has applied the ten-percent standard in decisions involving the penny stock market as well. See *LSCO Securities, Inc.*, Securities Exchange Act Release No. 28994 (March 21, 1991), 48 SEC Doc. 759; *James E. Ryan*, Securities Exchange Act Release No. 18617 (April 5, 1982), 24 SEC Doc. 1859; *First Pittsburgh Securities Corp.*, Securities Exchange Act Release No. 16897 (June 16, 1980), 20 SEC Doc. 401; *Costello, Russotto & Co.*, 42 S.E.C. 798 (1965); *J.A. Winston & Co.*, 42 S.E.C. 62, 69 (1964).

In addition, both the Commission and the NASD have held that compensation below the stated percentages with respect to equity securities may be excessive under certain circumstances. See *Shearson, Hammill & Co.*, 42 S.E.C. 811, 837 (1965) (Commission found mark-ups of 5.4%, 5.7%, and 6.3% excessive); *Thill Securities Corp.*, 42 S.E.C. 89, 92–95 (1964) (mark-downs as low as 3.9% found to be inconsistent with NASD Rules of Fair Practice).

[155] See, *e.g., Barnett* v. *United States*, 319 F.2d 340, 344 (8th Cir. 1963). For Commission rulings, see, *e.g., First Pittsburgh Securities Corp.*, 47 S.E.C. 299, 306 (1980); *DMR Securities, Inc.*, 47 S.E.C. 180, 182 (1979); *Maryland Securities Co., Inc.*, 40 S.E.C. 443, 446 (1960); *Samuel B. Franklin & Co.*, 38 S.E.C. 908, 910 n.4, *aff'd, Samuel B. Franklin & Co.* v. *SEC*, 290 F.2d 719 (9th Cir.), *cert. denied*, 368 U.S. 889 (1961).

[156] 47 S.E.C. 1034 (1984). The Commission has applied the *Alstead* principles in decisions involving the debt securities markets. See, *e.g.*, Amicus Brief of the Securities and Exchange Commission, *Elysian Federal Savings Bank* v. *First Interregional Equity Corp.*, 713 F.Supp. 737 (D.N.J. 1989) [No. 88–3528], at 15 n.20, 20 n.27. In an interpretive statement concerning the zero-coupon market, the Commission stated that the best evidence of the prevailing market price would generally be the broker-dealer's contemporaneous retail purchase price, adjusted to reflect the mark-down inherent in such customer transactions. Securities Exchange Act Release No. 24368 (May 5, 1987), 52 FR 15575. Zero-coupon securities are often a proprietary product of a broker-dealer that is usually the sole market maker in the interdealer market, if there is one.

[157] House Report 30.

[158] *Alstead*, at 1038. The NASD's policy in determining prevailing market price in calculating mark-ups and mark-downs is in accord with this position. The NASD's interpretation of its mark-up policy, reads, in relevant part: "Since the adoption of the "5% Policy" the Board has determined that. The mark-up over the prevailing market price is the significant spread from the point of view of fairness of dealings with customers in principal transactions. In the absence of other bona fide evidence of the prevailing market, a member's own contemporaneous cost is the best indication of the prevailing market price of a security." Interpretation of the Board of Governors, NASD Manual (CCH) ¶ 2154, at 2056.

However, in *Alstead*,[159] and in other decisions,[160] the Commission modified the contemporaneous cost standard for certain principal trades in active and competitive markets. A dealer trading in such a market, that is acting as a market maker rather than effecting a riskless principal trade, would be able to use its own contemporaneous interdealer sales price or the sales prices of other dealers, if known, in actual transactions as the basis for computing mark-ups and mark-downs.[161] In the absence of actual, contemporaneous interdealer sales by the market maker or other dealers, the market maker's own lowest offer quote, or the lowest offer quote of other market makers, may be used as evidence of prevailing market price.[162] However, in order to use an offer quote, the reliability of the market maker's offer prices generally must be validated over time by comparing them with actual interdealer transactions. Although such transactions need not be contemporaneous, they would have to occur with some frequency, and consistently be effected at prices at or around the offer quotes.[163]

In the absence of both actual interdealer sales and validated offer quotes, the market maker's contemporaneous cost must be employed as a basis for the computation. Contemporaneous cost is based on the market maker's purchase that is closest in time prior to the transaction.[164]

In a market dominated by a market maker to such an extent that it controls wholesale prices for a security,[165] market makers are required to apply the contemporaneous cost standard in calculating mark-ups. Where a market maker dominates the trading market for a security, it may be free to control both the quotation spreads and the trading occurring in that market. As a result, neither the market maker's offer quotations or interdealer sales may be indicative of an independent prevailing market price. Accordingly, in those situations, a market maker must use its contemporaneous purchase price in transactions with other dealers as evidence of the prevailing market price in calculating mark-ups. In the absence of actual interdealer purchases, the market maker must use its contemporaneous purchase price from retail customers, adjusted for the mark-down to such customers.[166] This mark-down adjustment should not exceed the amount generally accepted under the NASD's mark-up rule.[167]

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[159] *Alstead*, at 1035–36.

[160] See, *e.g.*, *Peter J. Kisch*, 47 S.E.C. 802, 808–809 (1982); *General Investing Corp.*, 41 S.E.C. 952, 954–55 (1964).

[161] *Alstead*, at 1036; See also *LSCO Securities, Inc.*, Securities Exchange Act Release No. 28994 (March 21, 1991), 48 SEC Doc. 759 (NASD properly computed mark-ups in certain transactions on basis of price that the firm charged another dealer); *Peter J. Kisch*, 47 S.E.C. 802, 808 (1982) (market maker's own actual contemporaneous sales to other broker-dealers should be used in computing mark-ups); *Gateway Stock and Bond, Inc.*, 43 S.E.C. 191, 194 (1966) (evidence showed that contemporaneous prices at which NASD member effected sales constitute appropriate basis for computing mark-ups). Interdealer transactions should be reasonably related to the best available quotations (*i.e.*, highest bid and lowest offer) regardless of whether such quotations are the dealer's own. Memorandum of the Division of Market Regulation to the Commission, In the Matter of Alstead, Strangis & Dempsey Inc., Administrative Proceeding File No. 3–6135 (April 8, 1983) (hereinafter referred to as "Division Memorandum"), at 21 n.47.

[162] Quotations for NASDAQ securities that are actively traded, have narrow spreads, and have significant trading independent of the market maker in question are an example of acceptable quotations under the circumstances set forth in this release. Division Memorandum at 23.

However, the Commission cautions that offer quotes may be employed only in certain limited situations. The Commission stated in *Alstead*, in relevant part: "Where there is an active, independent market for a security, and the reliability of quoted offers can be tested by comparing them with actual inter-dealer transactions during the period in question, such quotations may provide a proper basis for computing markups. Thus, if inter-dealer sales occur with some frequency, and on the days when they occur they are consistently effected at prices at or around the quoted offers, it may properly be inferred that on other days such offers provide an accurate indication of the prevailing market." *Alstead*, at 1036–37.

"The Commission traditionally has believed that actual transactions are a more reliable indicator of the prevailing market price than quotations. *Id.* at 32. Offer quotes by OTC market makers generally are negotiable. In less active markets, market makers often purchase securities at prices higher than their bid and sell at prices lower than their offer quotes, which may even be higher than the best bid or lower than the best offer. *Id.* at 8. As the Commission further stated in *Alstead*, 'quotations for obscure securities with limited inter-dealer trading activity may have little value as evidence of the current market.' *Alstead*, at 1036. The Commission reaffirmed the lack of reliability of quotations for thinly traded securities most recently in *LSCO Securities, Inc.*, Securities Exchange Act Release No. 28994 (March 21, 1991), 48 SEC Doc. 759. *See also Gateway Stock and Bond, Inc.*, 43 S.E.C. 191, 193 (1966) ('[s]ince such offers were not generally tested in the market place by sales by the member to dealers or by other inter-dealer sales, they were not a reliable guide to market price.'); *C.A. Benson & Co., Inc.*, 42 S.E.C. 952, 954 (1966) (firms did not sell a single share to another dealer at inside offer; thus NASD properly disregarded offering price in sheets)."

[163] The Commission generally has required strong evidence that offer quotes accurately reflect prevailing market price because of the lack of reliability of quotations in the OTC market. See, *e.g.*, *Alstead*, at 1036–37; *Gateway Stock and Bond, Inc.*, 43 S.E.C. 191, 193 (1966); *Naftalin & Co., Inc.*, 41 S.E.C. 823, 826–28 (1964). Moreover, the Commission has long held that a broker-dealer in enforcement proceedings has the burden of bringing forth evidence that the use of contemporaneous cost is not appropriate for computing mark-ups or mark-downs. See *James E. Ryan*, Securities Exchange Act Release No. 18617 (April 5, 1982), 24 SEC Doc. 1859 (contemporaneous cost as best evidence of prevailing market price is rebuttable presumption). See also *Barnett* v. *United States*, 319 F.2d 340, 344 (8th Cir. 1963); *Powell & Assocs., Inc.*, 47 S.E.C. 746, 747 (1982) (burden is on dealer to establish that contemporaneous cost is not "true market price"); *First Pittsburgh Securities Corp.*, 47 S.E.C. 299, 306 (1980) (dealer had burden to show costs did not represent mark-up); *Charles Michael West*, 47 S.E.C. 39, 41–42 (1979) (dealer has burden to establish that contemporary cost is not reliable indicator of prevailing market price).

[164] The Commission believes that same day purchases are the best indication of contemporaneous cost. However, the Commission recently has held that, absent some showing of a change in the market, contemporaneous cost may be based on interdealer purchases for a period up to five business days prior to a particular transaction. See *LSCO Securities, Inc.*, Securities Exchange Act Release No. 28994 (March 21, 1991), 48 SEC Doc. 759. See also *First Pittsburgh Securities Corp.*, 47 S.E.C. 299, 306 (1980) (contemporaneous cost not limited to same-day cost but prices paid by dealer should be "closely related in time" to its retail sales); *Advanced Research Assocs., Inc.*, 41 SEC 579, 611–12 (1963) ("substantially contemporaneous" purchase prices are calculated during period with little fluctuation in purchase and sales prices). In cases of multiple purchases during the day of sale, contemporaneous cost is based on the purchase price closest in time to the sale. The average of prices during that day or any particular period of time cannot be used. See *Century Securities Co.*, 43 S.E.C. 371, 378 (1967), *aff'd sub nom, Nees* v. *SEC*, 414 F.2d 211 (9th Cir. 1969) (average cost is not appropriate evidence of market price).

[165] In *Alstead*, the Commission found that Alstead, Dempsey & Co. dominated the market in a particular security where it had been the underwriter of that security on a "best efforts" basis and sold 95.7% of the offering to its own customers. Alstead, Dempsey & Co. became a market maker in the security, and during the period at issue, its transactions with other dealers and customers amounted to more than 297,000 shares out of a total volume of 345,000 shares, or 86% of the volume. Alstead, Dempsey & Co. effectively controlled the supply of the security since most of it was held by the registrant's customers. Only two other dealers were market makers in the stock, and their combined transactions amounted to only 7,750 shares, 2.2% of the total trading volume. The Commission consequently used Alstead, Dempsey & Co.'s contemporaneous cost of the stock in computing mark-ups. *Alstead*, at 1037.

[166] For example, in a recent decision, the Commission affirmed the NASD's inference of a 7% mark-down from contemporaneous prices paid to customers in determining prevailing market price for purposes of calculating mark-ups. See *LSCO Securities, Inc.*, Securities Exchange Act Release No. 28994 (March 21, 1991), 48 SEC Doc. 759.

[167] The Commission wishes to emphasize that even when disclosure of compensation is properly made under Rule 15g–4, a broker-dealer remains subject to the general antifraud provisions of the federal securities laws.

The Commission cautions that even if it fully meets the materiality requirements of the antifraud provisions of the federal securities laws, an NASD member that charges substantial mark-ups could violate Article III, section 4 of the NASD Rules of Fair Practice, which requires NASD members to "buy or sell at a price which is fair," and could violate the NASD's mark-up policy adopted under that section. Article III, Section 4, NASD Manual, Rules of Fair Practice (CCH) ¶2154, at 2054. The NASD rules apply to virtually all penny stock broker-dealers. Pursuant to Section 15(b)(8) of the Exchange Act, all registered broker-dealers that effect securities transactions must be a member of a

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3 Request for Comment

The Commission requests comment on proposed Rule 15g–4. In particular, commenters are requested to address the rule's definition of compensation and this release's articulation of the appropriate manner of determining prevailing market price in the penny stock dealer market.

G. Rule 15g–5: Associated Person Compensation

1. Compensation of Salespersons in the Penny Stock Market

In the House Report, the Committee noted the large spreads and mark-ups that are often charged in connection with penny stock transactions.[168] Large interdealer spreads for penny stocks provide the potential for great profits from penny stock transactions, both to broker-dealer firms and their associated persons who initiate and maintain contacts with customers. Because of the connection between extraordinary sales agent compensation and fraudulent practices relating to penny stocks, Congress concluded that requiring disclosure of compensation paid to associated persons in connection with penny stock transactions would provide important information to investors in evaluating recommendations by salespersons and could thereby help to deter penny stock fraud.

The compensation that a salesperson may expect to receive from his or her firm in certain situations may influence the salesperson's decisions concerning the securities that he or she recommends, purchases, and sells.[169] The federal securities laws and the rules thereunder recognize the need for disclosure to customers of broker-dealer compensation arrangements in certain contexts. For example, Rule 10b–10 under the Exchange Act requires that trade confirmations provided in connection with agency transactions must disclose, in addition to the amount of remuneration to be received by the broker-dealer from the customer, information concerning remuneration to be received from any other party in connection with the transaction.[170] In addition, Rule 15c1–6 [171] requires that both brokers and dealers receiving advisory fees may not effect transactions for or with customers in any security in the primary or secondary distribution of which such brokers or dealers are participating or financially interested unless they provide notification of such participation or interest.[172] Presently, however, there are no rules under the federal securities laws expressly requiring disclosure of remuneration received by associated persons, as distinguished from broker-dealer firms.[173] In the context of the penny stock market, large interdealer spreads often permit associated persons to receive compensation that is extremely large in relation to the price of the securities purchased or sold.[174] The potential compensation that salespersons may receive from penny stock transactions frequently is much greater than that deriving from transactions in securities with more established and competitive markets.[175] This financial incentive creates a potential conflict with the duties of broker-dealers and their associated persons to recommend suitable investments for and otherwise deal fairly with their customers, in light of the fact that speculative penny stocks often are not suitable for persons who have limited financial means and cannot afford a substantial or total loss of their investments.

Requiring disclosure of the compensation paid to associated persons will enable investors and potential investors to make more informed investment decisions. The rule would not affect or otherwise limit the obligation of broker-dealers under the general antifraud provisions to disclose to customers compensation arrangements where warranted by particular facts and circumstances.[176]

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national securities association. Currently, the NASD is the only national securities association. Only registered broker-dealers that effect securities transactions as a member of, and solely on, a national securities exchange, are not required to be NASD members. 15 U.S.C. 78*o*(b)(8). See also Securities Exchange Act Release No. 24368 (May 5, 1987), 52 FR 15575, at 15576 n.8 (rules of just and equitable principles of trade prohibit mark-ups that are unfair in light of all other relevant circumstances, even if disclosed).

[168] House Report 12.

[169] In discussing the effect of compensation structures of broker-dealer firms on the motivation of salespersons, the Special Study stated that This [compensation] system tends to make personal economic considerations a factor in the salesman's selection of securities which he recommends to his customers. Since he usually earns more money on over-the-counter transactions than on exchange transactions of comparable size, the salesman has an economic incentive to emphasize the former type of security in his recommendations. Since he earns little or no commission on customers' sales of securities in the over-the-counter market, he has an economic incentive to advise a customer to sell only if the proceeds are needed or likely to be used for the purchase of other securities. Since the salesman's rate of compensation is highest when he sells securities being distributed by the firm, he has an incentive to recommend such securities above all others . . . In addition to the financial pressure on the salesman to prefer particular categories of securities, the practice in some firms of stepping up his rate of compensation for each transaction in a given month, if the dollar volume of all his commission business during that month exceeds a fixed level, provides an inducement to exert extra effort to generate enough business in the month to qualify for the higher rate.

Special Study Part I at 260–1. See also M. Meyer, *Conflicts of Interest: Broker-Dealer Firms; Report to the Twentieth Century Fund Steering Committee on Conflicts of Interest in the Securities Markets* 18 (1975).

[170] Specifically, Rule 10b–10(a)(7)(iii) requires the broker-dealer to disclose "the source and amount of any other remuneration received or to be received by him in connection with the transaction; *Provided, however,* That if in the case of a purchase, the broker was not participating in a distribution, or in the case of a sale, was not participating in a tender offer, the written notification may state whether any other remuneration has been or will be received and that the source and amount of such other remuneration will be furnished upon written request of such customer." Compliance with Rule 10b–10 does not necessarily shield a broker-dealer from antifraud liability for undisclosed compensation. *Ettinger* v. *Merrill Lynch, Pierce, Fenner & Smith,* 835 F.2d 1031 (3d Cir. 1987). See also Rule 206(3)–2(a)(2) under the Investment Advisers Act of 1940 (the "Advisers Act") (17 CFR 275.206(3)–2(a)(2)), requiring similar confirmation disclosure in connection with agency cross transactions for advisory clients.

[171] 17 CFR 240.15c1–6.

[172] See also NASD Rules of Fair Practice, Art. III, sec. 14, NASD Manual (CCH) ¶2164, which contains a corollary provision. Rule 206(4)–3 of the Advisers Act (17 CFR 275.206(4)–3) requires written disclosure by investment advisers to their clients in certain situations involving the payment of fees to persons performing solicitation activities for the adviser.

[173] In 1978, the Commission considered requiring confirmation disclosure of remuneration to associated persons of a broker-dealer, in connection with transactions in certain recommended securities, where such remuneration exceeded the "normal or customary" remuneration that would otherwise have been paid to the associated persons. At the same time, the Commission stated its belief that "a failure to disclose special payments intended to induce dealers to effect transactions with customers would violate the antifraud provisions of the [Exchange] Act." Securities Exchange Act Release No. 15219 (October 6, 1978), 43 FR 47495.

[174] The NASAA Report stated, "Spreads [in the penny stockmarket] often are extremely wide and appear to have little relation to rational factors, such as supply and demand, cost, and level of risk * * * For penny stockbrokers, the spread is often the real attraction of the job, since the differential often is split down the middle between the brokerage firm and the salesperson. It is through this lucrative arrangement that many penny stockbrokers are able to pile up monthly earnings of $20,000, $50,000, or more." 1989 Hearings at 193.

[175] Former Commission Chairman David S. Ruder has given the following illustration: For example, a broker-dealer firm may buy 20,000 shares at the bid price of 10 cents per share ($2,000) from one customer, and sell to another customer at the ask price of 20 cents per share ($4,000). The firm often gives 50 percent of the spread ($1,000) to its registered representative. A similar $4,000 trade at a typical wire house in a listed security would result in only a $42 gross agency commission with 30 percent or $12.60 to the registered representative.

See Ruder Remarks. See also 1989 Hearings, at 75–76 (statement of Frank Birgfeld, Director, District III, NASD).

[176] For example, the Commission and the courts have long recognized that the failure by broker-dealers to disclose excessive commissions is fraudulent. See *e.g., Duker & Duker,* 8 SEC 388, 388–

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2. Description of the Proposed Rule

Section 15(g)(3)(A)(iii) of the Exchange Act requires the Commission to adopt rules to require both pre-transaction and confirmation disclosure by broker-dealers of compensation received or to be received by associated persons in connection with the transaction. Proposed Rule 15g–5 would require generally that any broker-dealer effecting a transaction in a penny stock must disclose to the customer (i) the amount of cash compensation received by certain associated persons of the broker-dealer in connection with the transaction and (ii) in certain cases, the amount of cash or other compensation received by such persons during the preceding year in connection with penny stock transactions generally.

The rule would apply to compensation received or to be received by an associated person [177] that is a natural person and has communicated with the customer in connection with the transaction. The rule is intended to reach those individuals who regularly solicit or recommend penny stock transactions, or otherwise communicate with customers in connection with those transactions and on whom customers are likely to rely in making investment decisions. Further, the rule includes a note emphasizing that payments under reciprocal arrangements in which sales agent commissions or other benefits paid in connection with a transaction were directed to associated persons other than the customer representatives in an attempt to avoid making the disclosures required by the rule would be considered to be sales agent compensation under the rule.

By operation of subparagraph (a)(2), described below, the rule could in some cases require disclosure with regard to persons who "communicate with the customer in connection with the transaction" but who will not receive any cash compensation in connection with that specific transaction. The Commission preliminarily believes that the rule requires this breadth in order to reach all associated persons who receive compensation in connection with penny stock transactions and who affect investment decisions by customers. However, the Commission requests comment on whether the application of the rule would be more appropriately limited to persons who receive compensation in connection with the particular transaction.

Subparagraph (a)(1) would require disclosure of either the aggregate or per share amount of cash compensation that the associated person has received or will receive in connection with the transaction, where such compensation is determined on a transactional or per share basis. Accordingly, the compensation could be expressed in either form, provided that per share compensation is unambiguously described as such. In addition, the compensation required to be disclosed would include that paid by any source other than the broker-dealer. For example, the Commission understands that in some cases, penny stock salespersons may receive direct compensation from issuers. The Commission believes that any such payments bear on the question of the salesperson's judgment and objectivity and should be included within the scope of the rule. The Commission requests comment on whether the required disclosure should segregate compensation received from persons other than the broker-dealer.

Subparagraph (a)(2) would require, in certain cases, disclosure with respect to associated persons covered by the rule of the aggregate amount of cash and other compensation received by the associated persons from any source during the preceding calendar year in connection with penny stock transactions generally. This provision would apply only if, during that period, the total amount of compensation received by an associated person in connection with penny stock transactions exceeded 25% of the total compensation received by such person in connection with all securities transactions.

Associated persons may sometimes be compensated for their sales activities through the payment of non-cash benefits. Where a salesperson receives a substantial portion of his or her compensation from transactions in penny stocks, the Commission believes that the disclosure of compensation should appropriately reflect the value of these benefits, both in order to fully inform customers and to prevent evasion of the rule's requirements. The value of non-cash benefits generally would be determined on the basis of fair market value. Where benefits are provided that have no reasonably ascertainable fair market value, the value determination would be made on the basis of the cost to the broker-dealer or other party providing the benefit.

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89 (1936), *Associated Securities Association*, 40 SEC 10, 14 (1960); *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 437 (1943), *cert. denied*, 321 U.S. 786 (1944). In addition, the failure by a broker-dealer to disclose certain other information, such as the cost and best price obtainable for securities purchased through the exercise of investment discretion, or its status as a market maker or the capacity in which it acts with respect to securities in which it effects customer transactions, may also violate the antifraud provisions of the federal securities laws. *Arleen Hughes v. SEC*, 174 F.2d 969 (D.C. Cir. 1949); *Chasins v. Smith, Barney & Co., Inc.*, 438 F.2d 1167 (2d Cir. 1970); *Norris & Hirshberg v. SEC*, 177 F.2d 228 (D.C. Cir. 1949); *Sutton v. Shearson Hayden Stone, Inc.*, 490 F. Supp. 98 (SDNY 1980) (nondisclosure of complaints concerning salesperson by other customers); *Naftalin & Co., Inc.*, Securities Exchange Act Release No. 7220 (January 10, 1964) (firm failed to disclose arrangement whereby it sold shares to its customers acting as agent for both a salesman and the customers); *Brennan v. Midwestern United Life Insurance Co.*, 266 F. Supp. 702 (N.D. Ind. 1968) (firm failed to disclose it had engaged in transactions while insolvent and had built up a large short position in a security it recommended and sold to customers), *affirmed on other grounds*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989; *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). This principle applies also to adverse interests or potential adverse interests of individual salespersons. See, *e.g., Barthe v. Rizzo*, 384 F. Supp. 1063 (SDNY 1974) (failure to disclose financial interest of salesman in venture capital fund that he recommended to the customer). In particular, at least two court decisions have found that in some circumstances information concerning the remuneration paid to salespersons in connection with particular transactions or types of transactions is material. *Shivangi v. Dean Witter Reynolds, Inc.*, 637 F. Supp. 1001, 1005 (S.D. Miss. 1986), *aff'd*, 825 F.2d. 885 (5th Cir. 1987) (affirming dismissal on the grounds that the defendant lacked scienter without reaching the question of materiality); *Platsis v. E.F. Hutton & Co.*, No. G–86–1030, 1990 U.S. Dist. LEXIS 4828 (W.D. Mich. April 24, 1990) (failure to disclose existence and amount of production credits received by sales agent recommending purchase of utility bonds held in inventory, as well as the existence and amount of the mark-up charged). See *generally*, R. Greene, "Differential Commissions as a Material Fact," 34 Emory L. J. 509, 542 (1985), suggesting that disclosure of the fact that a sales agent stands to gain a disproportionately high commission for the sale of a particular security may often be more important to the investor than the amount of the mark-up or the fact that the firm serves as a market maker. The Commission and courts have indicated that broker-dealers engaged in high pressure sales tactics may be held to especially high standards in their dealings with customers. See Jacobs, *The Impact of Securities Exchange Act Rule 10b–5 on Broker-Dealers*, 57 Cornell L. Rev. 869, 927 (1972), citing *Berko v. SEC*, 316 F.2d 137, 142 (2d Cir. 1963), *Hanly v. SEC*, 415 F.2d 589, 597 n. 14 (2d Cir. 1969), and *Harold Grill*, 41 SEC 321, 324–25 (1983); and *SEC v. Great Lakes Equities Co.*, (current) Fed. Sec. L. Rep. (CCH) ¶95,685, at 98,206–7 (E.D. Mich. September 4, 1990).

[177] Under section 3(a)(18) of the Exchange Act (15 U.S.C.) 78c(a)(18)), the term "associated person of a broker or dealer" includes "any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 15(b) of this title (other than paragraph (6) thereof)." The Penny Stock Act expanded the Commission's authority to impose a range of sanctions on persons associated or seeking to become associated with broker-dealers, as well as certain other persons participating in an offering of penny stocks. See the discussion herein at section III.A.

In addition, salespersons also are frequently provided compensation on other than a transactional or per share basis. For example, bonus payments may be dependent on reaching a minimum share volume in particular securities for which the broker-dealer acts as a market maker. Subparagraph (a)(2) is designed to permit a workable annual calculation of payments that are either in a non-cash form or are not readily allocable to specific transactions. The Commission requests comment on whether an annual period is an appropriate period in which to measure such payments, or whether it would be more useful to measure such payments on an alternative, such as a quarterly or monthly, basis.

3. Request for Comment

In addition to items as to which the Commission specifically solicits comment elsewhere, the Commission requests comment generally on the value to investors of the information that the proposed rule would require to be disclosed and the additional costs that would be imposed on broker-dealers and their associated persons.

H. Disclosure Procedures for Rules 15g–3, 15g–4, and 15g–5

Pursuant to the Penny Stock Act, proposed Rules 15g–3, 15g–4, and 15g–5 require a broker-dealer effecting penny stock transactions that are not exempted under proposed Rule 15g–1 to disclose to its customers certain information with respect to quotations, broker-dealer compensation, and associated person compensation at two different points in time.[178] The initial disclosure must be given to the customer by the broker-dealer orally or in writing, prior to effecting any transaction in a penny stock. The broker-dealer also is required to provide disclosure at the time of confirming the transaction.

The Commission expects that broker-dealers normally would satisfy the pre-trade disclosure requirement by providing the information to the customer orally during the conversation in which the customer agrees to the transaction. As a practical matter, however, the Commission recognizes that in some circumstances it may be difficult for the broker-dealer to obtain from its trading department the information necessary to comply with Rules 15g–3, 15g–4, and 15g–5 before effecting a transaction. Therefore, pursuant to the exemptive authority granted to it under section 505 of the Penny Stock Act,[179] the Commission proposes to exempt broker-dealers from the pre-trade disclosure requirement of the Penny Stock Act, provided that the broker-dealer satisfies certain conditions set forth in the exemptive provision of the proposed rules. Under the exemption, the broker-dealer is required to provide the required disclosure promptly after effecting the securities transaction, and at the time the broker-dealer provides this information, it must inform the customer that the customer has the unconditional right to cancel the transaction until the end of the following business day.[180] The customer or its authorized agent must actually receive this information and be informed of its right of cancellation before the one-day cancellation period begins. The broker-dealer may not attach any fees or penalty to the customer's exercise of the right of cancellation, or otherwise discourage the customer from exercising this right.[181]

In addition, the proposed rules require broker-dealers seeking to use the exemption to inform the customer in the written disclosure at the time of the confirmation that the customer has the right to cancel the transaction, that the broker-dealer has previously informed the customer of this right orally or in writing, as the case may be, and that the customer has not exercised this right.

The second point at which disclosure must be made is on the customer confirmation. Proposed Rules 15g–3, 15g–4, and 15g–5 require broker-dealers to provide written disclosure of the information required thereunder prior to or at the time of providing customers the confirmation disclosure required under Rule 10b–10 of the Exchange Act.[182] The inclusion of the information required under proposed Rules 15g–3, 15g–4, and 15g–5 on the Rule 10b–10 confirmation, or together with such confirmation, would comply with this requirement.

The Commission requests comment whether allowing broker-dealers to provide the required information orally will provide adequate protection to customers, or whether the information required to be disclosed to the customer prior to effecting a transaction in a penny stock should be in writing. The Commission also requests comment on whether the proposed exemption from disclosure of the required information prior to the trade through a post-trade right of cancellation offers equivalent protection to customers, and whether it would be of use to broker-dealers in satisfying their requirements under the rules.

I. Rule 15g–6: Monthly Account Statements

1. General Description of Proposed Rule

Proposed Rule 15g–6 would require broker-dealers that sell penny stocks to their customers to provide the customers with monthly account statements containing market value information pertaining to these securities. In general, the account statement would describe all such securities held in a customer's account as of the statement date, including the purchase price paid by the customer. Also, the account statement would contain price information for the security based on recent transactions in, or independent bids for, the security, where such information is available, or where such information is not available, a statement to that effect.

The Commission is proposing the rule pursuant to section 15(g)(3)(B), which provides that the Commission by rule

> * * * shall require brokers and dealers to provide, to each customer whose account with the broker or dealer contains penny stocks, a monthly statement indicating the market value of the penny stocks in that account or indicating that the market value of such stock cannot be determined because of the unavailability of firm quotes.

In its report, the Committee stated that it "views these mandatory monthly statements as crucial for providing investors more accurate, up-to-date information regarding all of their holdings of penny stocks." [183]

Paragraph (a) of Rule 15g–6 would provide that it shall be unlawful for a broker or dealer that has effected the

[178] See paragraph (b) in proposed Rules 15g–3, 15g–4, and 15g–5. The Penny Stock Act reads, in relevant part: "The Commission * * * by rule or regulation * * * shall require brokers and dealers to disclose to each customer, prior to effecting any transaction in, and at the time of confirming any transaction with respect to any penny stock [the information required under the Commission's rules] " 15 U.S.C. 78*o*(g)(3)(A).

[179] 15 U.S.C. 78*o*(g)(4).

[180] The Commission believes that, in accordance with industry practices with respect to agency transactions, the broker-dealer would be responsible for completion of the trade with respect to the counterparty even if its customer exercises its right of cancellation under the proposed rules.

[181] It should be emphasized that broker-dealers are required without exception to disclose their market maker status under proposed Rule 15g–7 prior to effecting the transaction in a penny stock, and are referred to section III.J of this release for a discussion of the requirements of that rule.

[182] 17 CFR 240.10b–10. The confirmation must be provided "at or before completion" of the transaction. See 17 CFR 240.10b–10(a).

[183] House Report 30.

sale of a penny stock to a customer [184] to fail to give or send to the customer a monthly account statement setting forth certain specified information concerning the security. Where the broker-dealer has sold more than one penny stock to the same customer, the required information concerning each security would be contained on one account statement.

Rule 15g–6 would apply to broker-dealers that deal directly with customers in selling penny stocks. Broker-dealers that do no more than provide carrying or clearing services in connection with sales of penny stocks would not thereby become subject to the account statement requirement. In this regard, it is important to note that the rule is not designed to preclude common clearing arrangements pursuant to which clearing firms provide various reporting services, including the preparation and sending of confirmations and account statements, to customers of introducing broker-dealers. An introducing broker-dealer that effects the sale of a penny stock to a customer would be permitted to delegate to another entity its obligation to provide account statements, although it would remain responsible for the fulfillment of the obligation.

Because Rule 15g–6 would apply to penny stocks sold by a broker-dealer in transactions with or for a customer, it would apply to penny stocks acquired by a customer in recommended transactions through a broker-dealer acting in either an agency or a principal capacity. Account statements also would be required to be provided by any legal successor to a broker-dealer that is required to provide account statements under the rule.

The rule would require account statements to be given or sent within ten days following the end of each period in which account statement securities are held in the customer's account. The Commission understands that, in general, firms that currently provide periodic account statements to their customers send the statements within one week after the end of each period, and the Commission preliminarily believes that firms should be able to provide the information within ten days. However, the Commission requests comment on the feasibility of this ten-day requirement, or whether a longer period would prove more workable while preserving the usefulness of the information to customers.

Pursuant to the exemptive authority provided by section 15(g)(4), the rule would provide a conditional exemption from the monthly statement requirement for broker-dealers that effect penny stock transactions for a particular customer on a very isolated or infrequent basis. Specifically, if a broker-dealer has not effected a transaction in any penny stock, whether a purchase or sale, for or with its customer for a period of six consecutive calendar months, the broker-dealer thereafter would be permitted to provide account statements on a quarterly basis, so long as no further penny stock transactions are effected in the account. Quarterly statements would then be required to be provided within ten days following the end of each such quarterly period.

The alternative of quarterly statements would not become available until after the expiration of six full calendar months. Further, once a broker-dealer has become entitled to send quarterly statements to a particular customer, if the broker-dealer effects a penny stock transaction for or with the customer's account, the broker-dealer will again become required to provide statements on a monthly basis, beginning with respect to the month in which the transaction occurs.

For example, if the broker-dealer sells a penny stock to a customer on March 15 and becomes subject to Rule 15g–6 by virtue of that transaction, the broker-dealer will be required to send monthly account statements to the customer by April 10. If the broker-dealer does not effect any further penny stock transactions for or with the customer during the period from March 15 to December 31 of the same year, the broker-dealer may provide to the customer a quarterly statement covering the period from October through December.

Where a broker-dealer effects penny stock transactions on an isolated basis, the Commission preliminarily believes that it may be appropriate to permit the broker-dealer to avoid the expense of monthly statements in favor of a quarterly procedure. The customer's need for account information on a monthly basis may be diminished where there is no account activity involving penny stocks over an extended period of time. The Commission requests comment as to whether such a proviso is appropriate, or whether some other time period, such as one year, without account activity involving penny stocks would be preferable.

The rule would apply to penny stocks, as defined in section 3(a)(51) and proposed Rule 3a51–1, held in the customer's account as of the end of the statement period. Accordingly, if a security that was within the penny stock definition at the time it was sold to a customer subsequently ceased to meet that definition, the account statement requirement would be suspended, but only for so long as the security was not a penny stock. Specifically, if a security did not meet the definition of penny stock in section 3(a)(51) and Rule 3a51–1 adopted thereunder as of the end of a statement period, the broker-dealer would not be required to provide an account statement with respect to that particular security for that particular period.

Further, subparagraph (a)(1) of the rule expressly would not apply with respect to any period for which an account statement for a particular penny stock would otherwise be required if, at the end of the period, transactions in the security would be exempted from the rule by operation of Rule 15g–1(a)(2). That provision provides an exemption for transactions in securities of an issuer that meets certain requirements relating to net tangible assets, based on recent information that is reviewed by the broker-dealer. Accordingly, broker-dealers would not be required to furnish information relating to a particular penny stock for any monthly or quarterly period, as the case may be, in which the issuer of the securities would qualify for the net tangible assets exemption. This determination would be made at the end of the period, based on financial statements dated less than fifteen months prior to such date that the broker-dealer has reviewed and has a reasonable basis for believing are accurate as of such date. [185] This provision would apply only to the broker-dealer's obligation to furnish information relating to the exempted security. The broker-dealer would remain obligated to furnish information concerning any other penny stocks that are held for the customer's account and are not exempted from the rule.

2. Objectives of the Proposed Rule

Many firms currently provide monthly or quarterly account statements, including market value information, to their customers, although there presently is no general requirement that broker-dealers furnish account statements. [186]

[184] Pursuant to subparagraph (e)(1) of the proposed rule, the term "customer" would not include a broker or dealer. Accordingly, transactions among broker-dealers would not trigger the application of Rule 15g–6.

[185] See the discussion of proposed Rule 15g–1 at Section III.C. herein.

[186] Broker-dealers that already furnish monthly account statements would not need to furnish a

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Where there has been a substantial decline in the value of the securities, the broker-dealer may have an incentive to withhold this information. In the absence of any specific requirement that broker-dealers furnish to customers market information on their holdings, customers often are unaware that the value of their investments has decreased.

In the past, unscrupulous broker-dealers have seized upon the lack of market information available to investors to encourage further investment, or to dissuade investors from selling securities previously purchased, based upon exaggerated claims of stock performance. In the Commission's experience, the extremely limited access by investors to information concerning the current market value of their securities, to the extent that such market value can be determined, has been a key element in the success of many fraudulent penny stock schemes. In the Commission's view, the additional secondary market information that would be required by Rule 15g–6 would provide investors with information necessary to evaluate broker-dealers' investment recommendations and should serve as an important means of preventing fraud.

The Commission recognizes that, in some cases, the broker-dealer may not be able to obtain the information because of a lack of market interest in the security. In these cases, the Commission believes that the fact that there is a lack of reliable market information concerning the security is itself an important piece of information needed by the investor in order to evaluate the extent of his or her risk exposure and whether to buy similar securities from the broker-dealer.

3. Information to be Contained in Account Statements

Rule 15g–6 would require that each account statement provide the specified information as of the last trading day of the period to which the statement relates. The rule would require the disclosure of two general categories of information, each of which is more fully described below:

(i) general identifying and historical information; and

(ii) where available, certain price and bid information related to recent sales of or bids for the security.

i. Identifying Information. For each penny stock held in the customer's account, subparagraph (b)(1) of the rule would require the statement to provide the identity and number of shares or units of the security held in the account, as well as the date or dates of purchase.[187] In addition, the statement would reflect the purchase price paid by the customer, including any mark-up, commission, or similar form of broker-dealer remuneration. The Commission preliminarily believes that, for most investors, purchase price information will be most meaningful if it reflects the aggregate amount paid by the customer to the broker or dealer to acquire the security. This is particularly true in the context of the penny stock market, where mark-ups, spreads, and commissions often are disproportionately large in relation to market value. The Commission requests comment, however, as to whether purchase price information would be more meaningful if it included the amount paid, exclusive of mark-ups and commissions, as well as separate disclosure of such payments.

ii. Market Value. Subparagraph (b)(2) of the rule would require the broker-dealer to provide information relating to the estimated market value of each penny stock held in the account. For purposes of this provision, the "estimated market value" of each penny stock would be based on recent purchases of the security by the broker-dealer furnishing the statement, or on bid prices for the security by other broker-dealers, where such information is available. Under subparagraph (b)(2)(i), if the broker-dealer has effected at least ten Qualifying Purchases in the security during the last five trading days to which the statement relates, the statement would be required to disclose the value of the shares held for the customer's account, based on the weighted average price per share paid by the broker-dealer in all Qualifying Purchases in the security during that period. Subparagraph (e)(1) of the proposed rule defines "Qualifying Purchases" as *bona fide* purchases by the broker-dealer for its own account, each involving at least 100 shares, but excluding block purchases involving more than five percent of the outstanding shares or units of the security. This provision of the proposed rule recognizes that the broker-dealer that has sold a penny stock to its customer is often the most likely potential purchaser of the security. Lacking other reliable quotation or transaction information, the price at which the broker-dealer furnishing the statement has recently purchased the security may provide the best general indication of the price at which the customer could realistically dispose of the same security.[188] Moreover, this information is known by the broker-dealer and can be derived from information retained in its records. Block purchases of more than five percent have been excluded because of the distorting effect that transactions of this size are likely to have on the per share transaction price.

If there are an insufficient number of Qualifying Purchases in the security during the period, subparagraph (b)(2)(ii) would apply. That provision states that, where there are at least three Qualifying Bids for the security made during the last five trading days of the period to which the statement relates, the statement must disclose the value of the shares held for the customer's account, based on the average of all Qualifying Bids as of the end of each day of the five-day period on which any Qualifying Bids were made. Subparagraph (e)(2) defines "Qualifying Bids" as bona fide, priced interdealer bid quotations entered into any interdealer quotation system, and which are made by independent market makers in the security. "Interdealer quotation system" is defined by reference to the definition contained in Rule 15c2–7(c),[189] i.e., "any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers but shall not include a quotation sheet prepared and distributed by a broker or dealer in the regular course of his business and containing only quotations of such broker or dealer."[190]

separate document, provided that the statement contains all the information and is sent within the time period required by the proposed rule. Certain rules of the Commission or self-regulatory organizations may require that account statements be provided by certain broker-dealers or with respect to certain accounts. See Rule 15c3–3 (17 CFR 240.15c3–3) (requiring statements in connection with the use of customer free-credit balances by the broker-dealer in its operations); Rule 10b–16(a)(2) (17 CFR 240.10b–16(a)(2)) (requiring statements containing information with respect to credit extended by the broker-dealer); New York Stock Exchange Rule 409, 2 New York Stock Exchange Guide (CCH) ¶ 2409.

[187] This information presently is required to be included on trade confirmations pursuant to Rule 10b–10.

[188] By requiring the disclosure of historical or average price information concerning a security, the Commission is not suggesting that broker-dealers would have a duty to effect future transactions at the prices reflected on the account statement, although they would of course remain obligated to obtain the best available execution for their customers.

[189] 17 CFR 240.15c2–7(c).

[190] The definition would include systems and publications such as the pink sheets and the NASD's OTC Bulletin Board but would not include proprietary trading systems that provide quotations only to a limited number of subscribing broker-dealers.

Accordingly, where there are insufficient Qualifying Purchases by a broker-dealer furnishing the statement, subparagraph (b)(2)(ii) would provide an indication of the "inside" price that third party market makers [191] have indicated their willingness to pay, within a reasonable time proximity to the date of the account statement. Under this provision, where the security is quoted on the OTC Bulletin Board or other automated quotation system, the estimated market value would be based on the last Qualifying Bid entered in the system by each market maker on each day in the five-day period on which any Qualifying Bids were entered in the system. If the security is quoted in another type of interdealer quotation system, such as the pink sheets, the estimated value would be based on the average of all Qualifying Bids for the security shown in the system during the same five-day period.

The Commission is aware that bid quotations for penny stocks often are not binding or firm for any number of shares and do not necessarily reflect a reliable price at which an investor would be able to resell the securities. The Commission preliminarily believes, however, that where three or more independent market makers for a security exist, and where those dealers have provided recent prices indicating their interest in purchasing the security, these quotations have sufficient potential value to investors to justify mandating their communication to investors in the account statement.[192]

The proposed rule provides that market value information must be based on *bona fide* transactions or bids. If the broker-dealer knows or reasonably should know that certain price or bid information is not derived from legitimate business activity, but instead is generated for the purpose of creating apparent market activity, this information would not satisfy the requirements of the rule.[193] In this connection, the definition of "Qualifying Bids" specifically refers to quotations entered by market makers that are independent of each other and the broker-dealer furnishing the account statement. Thus, where the broker-dealer knows or reasonably should know that a market maker providing a bid for a security is acting in concert with or controls or is controlled by the broker-dealer or other market makers for that security, the bid would not be a "Qualifying Bid."

Under subparagraph (b)(2)(iii) of the proposed rule, in the absence of both Qualifying Purchases and Qualifying Bids that satisfy the requirements of subparagraphs (b)(2)(i) and (b)(2)(ii), the account statement must specifically indicate that there is "no estimated market value" for the security. In addition, the legend that must be contained in each account statement under paragraph (c), described further below, would indicate that there is a lack of available information concerning recent purchases or bids for the security.

The requirement of subparagraph (b)(2) that estimated market values be provided in the account statement is based on an assumption that such information, where it is available and easily accessible, should be made available to customers who have little or no access to information that reflects on the value of their securities holdings. The Commission believes that the danger that customers provided with this information may misinterpret or give undue weight to it can be ameliorated by additional disclosure, described below. The Commission requests comment on the extent to which broker-dealers selling penny stocks currently provide account statements to their customers, the costs entailed in providing the required disclosures, and whether other methods or measures of price or quotation information would provide more useful or reliable information to customers.

4. Prescribed Legend

Paragraph (c) of the proposed rule specifies certain standard information, in the form of a prescribed legend to be contained in all account statements provided under paragraph (a). The legend is required to be "conspicuously displayed." In order to be conspicuous, large or otherwise distinguishable type should be used to set apart the legend from the other information contained in the statement.[194]

The legend states that the market for the securities may be limited. In addition, the legend indicates that (i) with respect to securities for which estimated market values have been furnished, such information is based on recent purchases by the broker-dealer furnishing the statement or on bid prices by other broker-dealers, and this information may not serve as a reliable indicator of the price that the customer could obtain in selling the securities, (ii) with respect to securities listed in the account statement for which estimated market values have not been provided, such values cannot be determined because sufficient purchase or bid information is not available, and (iii) the securities are subject to the payment of commissions or mark-downs on resale. The legend also states that the broker-dealer furnishing the statement may not refuse to accept the customer's order to sell the securities. This language has been included in response to the Commission's understanding that fraudulent penny stock schemes sometimes include the firm's refusal to accept sell orders.

The Commission requests comment on whether the language prescribed by paragraph (c) of the rule would serve both to provide useful information and to allow investors to view the information provided by the account statements in the appropriate context.

5. Recordkeeping

Paragraph (d) of the rule would require broker-dealers furnishing account statements to maintain written records of the information described in paragraph (b) and to preserve those records for the periods specified in Rule 17a–4 of the Exchange Act.[195] This

[191] The term "market maker" is defined by section 3(a)(38) of the Exchange Act [15 U.S.C. 78c(a)(38)] to include "any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an interdealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis."

[192] It is contemplated that, until a quotation system for penny stocks complying with the requirements of Section 17B of the Exchange Act is operational, Qualified Bids, if they exist with respect to a particular security, will be found in the NASD's OTC Bulletin Board, the pink sheets, or other similar printed or electronic systems of general circulation among brokers and dealers. The proposed rule does not contemplate that broker-dealers furnishing account statements must make any independent, direct inquiry of dealers in order to derive unpublished indications of interest.

[193] Moreover, the participation by a broker-dealer in generating such artificial information generally would violate the antifraud provisions of the federal securities laws. The Commission has found that broker-dealers engaged in unlawful manipulation by arranging with other broker-dealers to appear in the pink sheets and to guarantee a purchase of shares against loss, or by compensating another broker-dealer for maintaining quotations in its own name. *Masland, Fernon & Anderson*, 9 S.E.C. 338, (1941); *SEC* v. *Scott Taylor & Co.*, 183 F. Supp. 904 (SDNY 1959); *M.S. Wien & Co.*, 23 S.E.C. 735, 739–745 (1946); *Adams & Co.*, 33 S.E.C. 444, 449 (1952); *Junius A. Richards*, 4 S.E.C. 742 (1939).

[194] See Securities Exchange Act Release No. 26805 (May 10, 1989), 54 FR 21144, 21153 (approving rule changes by certain self-regulatory organizations to require, among other things, certain prominent disclosures relating to pre-dispute arbitration provisions contained in broker-dealer account agreements).

[195] 17 CFR 240.17a–4. Under subparagraph (b)(4) of that rule, a broker-dealer is required to keep for three years, the first two years in an accessible place, "originals of all communications received and copies of all communications sent by such [broker-dealer] (including inter-office memoranda and communications) relating to his business as such.' Much of the information contained in account

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recordkeeping requirement is intended to assure that broker-dealers will be able easily to demonstrate compliance with the rule and to respond to questions from customers concerning the specific bases for the information that is contained in the account statements.

6. Request for Comment

The rule is designed to provide information concerning the market for penny stocks to investors in these securities, without imposing an undue burden on brokers and dealers that sell the securities. The Commission preliminarily believes that information that reflects upon the value of account statement securities should be provided where it is sufficiently valid and reliable that the potential value of the information to investors outweighs the dangers that it will prove misleading or be used for fraudulent purposes.

In proposing the rule, the Commission has attempted to strike this balance, while at the same time cautioning customers that, in light of the limited market for the securities, they should not give undue weight to price or bid information that is furnished. Although, as noted above, there currently is no general requirement that broker-dealers provide periodic account statements to customers, many broker-dealers routinely provide such statements for business reasons. These account statements frequently contain information concerning customer positions and the current market values of securities held in a customer's account. While proposed Rule 15g–6 may require disclosure of some information not currently contained in customer account statements, the Commission anticipates that in many cases broker-dealers will be able to comply with the rule by supplementing the statements they now provide. The Commission specifically requests comment on the extent to which the rule would require broker-dealers to depart from their current practice.

In addition, the Commission solicits comment generally on the value to investors of the information prescribed by the proposed rule and the costs to broker-dealers that would be entailed. The Commission is interested particularly in quantitative estimates of the incremental expense involved in preparing account statements, whether the required information could be generated through automated means, and the ease with which such information could be integrated into existing account statements.

J. Rule 15g–7: Penny Stock Market Makers

1. Description of the Proposed Rule

Proposed Rule 15g–7 would require that where a broker-dealer, or an affiliate of a broker-dealer, is a sole market maker with respect to a penny stock, the broker-dealer must disclose this fact to its customer and its or its affiliate's influence over the market for the security, prior to effecting any transaction in the security for the customer's account and in writing at or prior to the sending of the trade confirmation. Rule 15g–7 also would prohibit certain representations by a market maker of a penny stock or an affiliate that effects a transaction in the security with a customer that the transaction is being effected "at the market" or at a price related to the market price.

As indicated, the rule would apply both to penny stock market makers and to broker-dealers that control, are controlled by, or are under common control with, such firms ("affiliates"). The Commission preliminarily believes that investors' need for information concerning market control by an executing broker-dealer or its affiliate and for protection from misrepresentations concerning price exists also where control is exerted by a related entity. In addition, the Commission is concerned that penny stock market makers may otherwise attempt to evade the rule's requirements by using an affiliate to effect customer transactions on an agency basis.

The rule expressly would not apply to transactions by broker-dealers with other broker-dealers, or to market making activities conducted by specialists on a national securities exchange. The Commission believes that this disclosure would not be necessary in these limited circumstances, given the market position of broker-dealers and the existence of exchange rules governing the conduct of specialists.

The rule also would not apply if the broker-dealer, at the time of the transaction, had reasonable grounds to believe that there was an independent market for the security. Accordingly, if a market maker in a penny stock or its affiliate effects a transaction in the security for the account of its customer and fails to comply with the requirements of the rule, it must be able to demonstrate a good faith and reasonable belief that an independent market for the security existed at the time of the transaction. Because of the near-monopoly on information concerning penny stocks held by market makers in those securities, the Commission believes that the circumstances that could give rise to such a reasonable belief would be extremely limited.[196] The Commission requests comment, however, on the extent to which market makers may be uncertain as to the presence of an independent market and as to the appropriateness and usefulness generally of this reasonable belief standard.[197]

The Commission is proposing to adopt Rule 15g–7 under the general rulemaking authority granted by section 15(g)(5)[198] of the Exchange Act, which provides that

> [i]t shall be unlawful for any person to violate such rules and regulations as the Commission shall prescribe in the public interest or for the protection of investors or to maintain fair and orderly markets (A) as necessary or appropriate to carry out this subsection; or (B) as reasonably designed to prevent fraudulent, deceptive, or manipulative acts and practices with respect to penny stocks.

The House Report noted the substantial effect that control of the market for a security by one or a few firms, which are often affiliated, may have in furthering penny stock fraud.[199] Because the control of the market for individual penny stocks by individual broker-dealers exacerbates and is intertwined with the absence of information for investors and their exposure to fraud and manipulation, the Commission preliminarily believes that Rule 15g–7 is an appropriate means of carrying out the purposes of section 15(g) and is reasonably designed to prevent fraudulent, deceptive, or manipulative acts and practices with respect to penny stocks.

2. Disclosure of Sole Market Maker Status

Where only one dealer acts as a market maker in a security, by holding itself out as being willing to buy and sell the security for its own account on a regular or continuous basis, the market for the security is necessarily a non-

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statements under the proposed rule undoubtedly would be independently documented by other records required to be maintained under Rule 17a–4.

[196] For example, a penny stock market maker could be excused from disclosing that it was the sole market maker with respect to a security if, at the time of the transaction, an independent dealer held itself out as a market maker and provided quotations for the security on an interdealer quotation system but in fact was not then willing to effect transactions in the security, and the penny stock market maker relied in good faith on the information that was available to it.

[197] See discussion below concerning Rule 15c1–8, which contains a similar standard.

[198] 15 U.S.C. 78o(g)(5).

[199] House Report, at 11, 20.

competitive one, and the dealer can be said to exercise substantial influence over that market. A market that is influenced in this way is particularly susceptible to fraud and manipulation,[200] and many instances of abuse in the penny stock market have involved transactions in a stock by controlling broker-dealers. This concern was identified in 1963 by the Special Study, which recommended that dealers in the OTC market be required to make pre-transaction disclosure of the absence of an independent market.[201]

The influence by a sole market maker over market price is most readily apparent where the market maker is acting or has acted as an underwriter for the issuer's securities, or where there has been some other direct relationship between the issuer and the market maker. The Commission requests comment on whether the application of paragraph (a) should be limited to these situations, and on the extent to which any sole market maker for a penny stock exerts influence over the market for the security.

In some cases, a broker-dealer that is not the only market maker for a penny stock may effectively control or dominate the market for the security and as a result may arbitrarily establish transaction prices in the security. The proposed rule, however, does not specify the disclosure required in these situations because the Commission preliminarily believes that the question of market control in such cases presents problems of definition and often may require a subjective assessment by the broker-dealer. The Commission requests comment on whether the scope of the rule should be expanded in this regard.

By proposing Rule 15g–7, the Commission does not mean to suggest that disclosure of influence over the market and similar important information by a broker-dealer would not otherwise be required by the general antifraud provisions, with respect both to penny stocks and other securities. For example, it is well established that the antifraud provisions of the Exchange Act apply to the failure of a broker-dealer that effects transactions in a security for or with its customers to disclose that it is a market maker in the security.[202] Paragraph (a) of the proposed rule is designed expressly to require disclosure of certain information that, based on experience, poses a risk of broker-dealer fraud.[203]

Further, irrespective of the potential for fraud, the status of a dealer or its affiliate as the sole market maker for a security implies that it may be difficult for an investor to resell the security to or through any other party. The Commission preliminarily believes that penny stock customers should be aware of the influence exercised by the dealer from or through which they execute transactions. This knowledge will allow investors to more carefully scrutinize the conduct of broker-dealers and make more informed investment decisions concerning those securities or other securities recommended by securities salespersons.

The term "market maker" is defined by section 3(a)(38) of the Exchange Act [204] as "any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an interdealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis." Accordingly, a dealer that provides quotations for a penny stock in the OTC Bulletin Board, the pink sheets, or similar interdealer publications or systems presumptively would be considered as a market maker with respect to that security. In addition, a dealer that does not provide quotations in a recognized system but that nevertheless holds itself out to other broker-dealers or other customers on a regular or continuous basis, by any means of advertising or solicitation, as being willing to buy and sell a penny stock, will fall within this category.

The disclosure requirement of subparagraph (a) would apply only to broker-dealers that are the sole market makers in penny stocks and their affiliates. Thus, the disclosure would not be required of an OTC market maker where there exists another broker-dealer acting as an exchange specialist with respect to the security. Otherwise, the broker-dealer would be permitted to omit the disclosure required by subparagraph (a) only where it has reasonable grounds to believe that a market for the security exists other than that made, created, or controlled by the dealer or its affiliate.

Under paragraph (b), the disclosure must be provided both orally or in writing, prior to the transaction, and in writing, at or prior to the sending of the trade confirmation. Unlike the corresponding paragraphs of Rules 15g–3, 15g–4, and 15g–5, this provision would not permit the broker-dealer to furnish the information after execution, conditioned on the customer's right to cancel the transaction. Because the broker-dealer's status as a sole market maker will be based on facts in existence and known by the broker-dealer at the time of the transaction, the Commission believes that the information should in all cases be provided to the customer in advance of the transaction.

The Commission has not attempted to prescribe mandatory language to be used to satisfy the written disclosure requirement but would expect that the disclosure would clearly indicate that the broker-dealer exerts substantial influence over the market for the security. The Commission requests comment on whether mandated written language would more fully serve the purpose of the proposed rule.

3. Prohibited Representations

Paragraph (c) of the rule would provide that a market maker in a penny stock or an affiliate effecting a transaction in that security with a customer may not represent that the transaction is being effected "at the market" or at a price related thereto unless the broker-dealer has reasonable grounds to believe that a market for the security exists other than that made, created, or controlled by it or its affiliate. This language is similar to that of Rule 15c1–8 under the Exchange Act, which prohibits certain representations related to market price by broker-dealers that participate or have a financial interest in distributions of OTC securities. [205] Rule 15c1–8 has been an

[200] *See Alstead, Strangis & Dempsey, Inc.* 47 S.E.C. 1034 (1984) (charging of excessive mark-ups by controlling market maker); *Jack W. Pagel*, Securities Exchange Act Release No. 22280 (August 1, 1985), *aff'd, Pagel, Inc.* v. *SEC*, 803 F.2d 942 (8th Cir. 1986) (abuse of underwriter's position in precluding a competitive market from arising by controlling wholesale prices).

[201] *Special Study* Part 2, 677 (1963).

[202] *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972); *Chasins* v. *Smith Barney & Co., Inc.*, 438 F.2d 1167, 1172 (2d Cir. 1970); *Cant* v. *A.G. Becker & Co.*, Fed. Sec. L. Rep. (CCH) ¶ 93,347 (1971–1972 Transfer Binder) (N.D. Ill. 1971). Rule 10b–10 (17 CFR 240.10b–10) requires that broker-dealers that are market makers in an equity security, when acting as principal in effecting a transaction in the security with a customer, disclose this fact on the trade confirmation.

[203] See also Rule 15c1–5 (17 CFR 240.15c1–5) (requiring pre-transaction disclosure of a control relationship between a broker-dealer and the issuer of the security).

[204] 15 U.S.C. 78c(a)(38).

[205] 17 CFR 240.15c1–8. Rule 15c1–8 was adopted (as Rule MC8) in 1937 as one of a series of antifraud provisions aimed at broker-dealer practices. Securities Exchange Act Release No. 1330 (August 4, 1937). The text of Rule 15c1–8 is as follows: "The term 'manipulative, deceptive, or other fraudulent device or contrivance,' as used in Section 15(c)(1) of

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important tool in the prosecution by the Commission of enforcement actions related to penny stock fraud. [206]

Paragraph (c) is designed to complement the affirmative disclosure obligations of paragraph (a) by prohibiting express or implied representations by penny stock market makers and their affiliates that cause customers to believe incorrectly that there is an independent market for the security. For instance, a representation by a broker-dealer to a customer that it is selling or buying a security at or below the market price necessarily implies the existence of an independent market. Where this is not the case, the Commission believes that such representations are *per se* misleading.

The prohibition would not be limited to an explicit representation that securities are being sold or purchased at or below the "market price." Any statements that necessarily imply this representation would also be prohibited. The Commission and the courts have long held that customer transactions by broker-dealers ordinarily carry an implied representation that the price to the customer is reasonably related to the prevailing market price. [207] In addition, the Commission has found that salespersons who solicited buy orders from their customers and "quoted the market to their customers in the ordinary manner" violated Rule 15c1–8 where no independent market existed. [208]

Paragraph (c) would apply to any market maker in a penny stock, whether or not it is the "sole" market maker. Because this provision is meant to prohibit misleading representations, rather than impose an affirmative disclosure obligation, the Commission preliminarily believes that it is appropriate to impose the requirement on all penny stock market makers, which are clearly in a position to determine whether they control the market for individual securities and should avoid representations that indicate otherwise.

4. Request for Comment

In addition to items as to which the Commission specifically solicits comment elsewhere, the Commission requests comment generally on the potential effectiveness of the proposed rule in preventing misrepresentations and providing useful information to investors in connection with penny stock transactions and the additional costs that would be imposed on broker-dealers thereby.

IV. Rule 15c2–6

As discussed above, Rule 15c2–6 also currently imposes obligations on broker-dealers with respect to low-priced securities that are traded in the non-NASDAQ OTC market. In general, Rule 15c2–6 prohibits a broker-dealer from selling to or effecting the purchase of a "designated security" for any person, unless the broker-dealer has approved the purchaser's account for transactions in designated securities and has received the purchaser's written agreement to the transaction, or unless the transaction specifically is exempt from the requirements of the rule. In order to simplify broker-dealer compliance with both Rule 15c2–6 and the disclosure rules under the Penny Stock Act, the Commission intends to amend Rule 15c2–6 at a later date to make the rule consistent, where appropriate, with the penny stock rules. The changes to Rule 15c2–6 would be primarily structural, and therefore would not significantly alter the scope of the rule.

Currently, the definitions and exemptions in proposed Rules 3a51–1 and 15g–1 differ from those in Rule 15c2–6 in a number of respects. [209] One example of a possible conforming amendment to Rule 15c2–6 would be to incorporate in Rule 15c2–6 proposed Rule 15g–1's narrower exemption for transactions in securities issued by an issuer in operation for less than three years, as well as the narrower exemption for transactions with accredited investors. Another example would be to incorporate in Rule 15c2–6 proposed Rule 15g–1's limited exemption for NASDAQ securities, so that only agency cross transactions and transactions involving a NASDAQ market maker or an underwriter in an offering of NASDAQ securities would be exempt from the requirements of the rule. [210] A third example would be to base the *de minimis* exemption in Rule 15c2–6 on transactions in penny stocks, as defined in Rule 3a51–1, rather than transactions in designated securities.

The Commission also is considering amending Rule 15c2–6 to require broker-dealers to distribute a standardized risk disclosure document to customers before effecting the first transaction in securities subject to the rule with or for a customer. The document would resemble the risk disclosure document set forth in proposed Rule 15g–2, but would include a statement regarding the broker-dealer's obligations under Rule 15c2–6.

The Commission believes that conforming Rule 15c2–6 and the penny stock rules would simplify broker-dealer compliance procedures. Accordingly, the Commission requests comment on its plan to amend Rule 15c2–6 to make the rule consistent in appropriate respects with the penny stock rules. Specific language will be proposed for public comment after the Commission receives comments on proposed Rule 3a51–1 and Rules 15g–1 through 15g–7. [211]

V. Conclusion

The Commission is proposing Rule 3a51–1, Rules 15g–1 through 15g–7, and Schedule 15G to implement the directives of the Penny Stock Act. In addition to the comments requested earlier, the Commission solicits comment on the effectiveness of the regulatory scheme set forth above and its effect on the market for penny stocks subject to the rules.

VI. Effects on Competition and regulatory Flexibility Act Considerations

Section 23(a) of the Exchange Act [212] requires that the Commission, in adopting rules under the Exchange Act, consider the anticompetitive effects of such rules, if any, and balance any anticompetitive impact against the regulatory benefits gained in terms of furthering the purposes of the Exchange Act. The Commission is preliminarily of the view that proposed Rule 3a51–1 and Rules 15g–1 through 15g–7 would not result in any burden on competition that is not necessary or appropriate in

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the Act, is hereby defined to include any representation made to a customer by a broker, dealer or municipal securities dealer who is participating or otherwise financially interested in the primary or secondary distribution of any security which is not admitted to trading on a national securities exchange that such security is being offered to such customer 'at the market' or at a price related to the market price unless such broker, dealer or municipal securities dealer knows or has reasonable grounds to believe that a market for such security exists other than that made, created, or controlled by him, or by any person for whom he is acting or with whom he is associated in such distribution, or by any person controlled by, controlling, or under common control with him."

[206] See, *e.g.*, *SEC* v. *Blinder, Robinson & Co., Inc.*, Litigation Release No. 12539 (July 12, 1990); *SEC* v. *Thomas James Associates, Inc.*, Litigation Release No. 12540 (July 12, 1990).

[207] *Charles Hughes & Co.* v. *SEC*, 139 F.2d 434, 437 (2d Cir 1943), *cert. denied*, 321 U.S. 786 (1943); *Norris & Hirshberg, Inc.*, 21 S.E.C. 865, 881 (1949); *Theodore A. Landau*, 40 S.E.C. 1199, 1126 (1962) *aff'd sub nom, SEC* v. *Scott Taylor & Co.*, 183 F. Supp. 904 (SDNY 1959).

[208] *Shearson, Hammill & Co.*, 42 S.E.C. 811, 823–25 (1965).

[209] For further discussion of the definition of "designated security" and the transactional exemptions provided by paragraph (c) of Rule 15c2–6, see discussion *supra*, at section II of this release.

[210] See the discussion of proposed Rule 15g–1 at Section III.C. of this release.

[211] The amendments to Rule 15c2–6 therefore will reflect any subsequent amendments to the penny stock rules, particularly Rules 3a51–1 and 15g–1.

[212] 15 U.S.C. 78w(a)(2).

implementing the requirements of the Penny Stock Act and otherwise in furtherance of the purposes of the Exchange Act. The Commission requests comment, however, on any competitive burdens that might result from adoption of the rule.

In addition, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA"), pursuant to the requirements of the Regulatory Flexibility Act,[213] regarding the proposed rules. The IRFA indicates the proposed rules could impose some additional costs on small broker-dealers and small issuers. The Commission believes, however, that the rules minimize these costs to the greatest extent possible while still fulfilling their purpose under the Penny Stock Act and otherwise under the Exchange Act to prevent fraud. A copy of the IRFA may be obtained from Alexander Dill, Attorney, Office of Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 5–1, Washington, DC 20549, (202) 504–2418.

List of Subjects in 17 CFR Parts 240 and 241

Reporting and recordkeeping requirements, Securities.

VII. Statutory Basis and Text of Amendments

In accordance with the foregoing, the Commission is proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77s, 78c, 78d, 78i, 78j, 78l, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 79q, 79t, 80a–29, 80a–37, unless otherwise noted.

2. By adding § 240.3a51–1 as follows:

§ 240.3a51–1 Definition of penny stock.

For purposes of section 3(a)(51) of the Act, the term "penny stock" shall mean any equity security other than a security:

(a) That is a reported security, as defined in 17 CFR 240.11Aa3–1(a) of this chapter;

(b) Issued by an investment company registered under the Investment Company Act of 1940;

(c) That is a put or call option issued by the Options Clearing Corporation;

(d) That has a price of five dollars or more, excluding any broker-dealer commission, commission equivalent, mark-up, or mark-down in an agency transaction or a contemporaneous offsetting purchase and sale principal transaction, but including any broker-dealer mark-up or mark-down in any other principal transaction;

(1) For purposes of this paragraph—

(i) a security has a price of five dollars or more for a particular transaction if the security is purchased or sold in that transaction at a price of five dollars or more; and

(ii) other than where a particular transaction is effected, a security has a price of five dollars or more at a given time if: the average of three or more *bona fide* independent interdealer bid quotations at specified prices displayed at that time in an interdealer quotation system, as defined in 17 CFR 240.15c2–7(c)(1), by market makers in the security to which the quotations apply, is five dollars or more; or a bona fide independent bid quotation displayed by a national securities exchange that makes transaction reports available pursuant to 17 CFR 240.11Aa3–1 is five dollars or more.

(2) If a security is a unit composed of one or more securities, the unit price divided by the number of shares of the unit that are not warrants, options, rights, or similar securities must be five dollars or more, as determined in accordance with paragraph (d)(1) of this section, and any share of the unit that is a warrant, option, right, or similar security, or a convertible security, must have an exercise price or conversion price of five dollars or more;

(e) registered, or approved for registration upon notice of issuance, and traded on a national securities exchange that:

(1) makes transaction reports available pursuant to 17 CFR 240.11Aa3–1; and

(2) has maintenance listing criteria that include, as a grounds for delisting a security of an issuer, a minimum $2,000,000 issuer net tangible assets or stockholders' equity standard, either alone, or in conjunction with a net income standard; or

(f) authorized, or approved for authorization upon notice of issuance, for quotation on an automated quotation system that:

(1) is sponsored by a registered securities association;

(2) was established and in operation before January 1, 1990; and

(3) has maintenance qualification criteria that include, as a grounds for terminating the quotation of a security of an issuer, a minimum $2,000,000 issuer net tangible assets or stockholders' equity standard, either alone, or in conjunction with a net income standard.

3. By adding § 240.15g–1 as follows:

§ 240.15g–1 Exemption for certain transactions.

(a) The following transactions shall be exempt from 17 CFR 240.15g–2, 17 CFR 240.15g–3, 17 CFR 240.15g–4, 17 CFR 240.15g–5, and 17 CFR 240.15g–6 of this chapter:

(1) Transactions by a broker or dealer:

(i) Whose commissions, commission equivalents, mark-ups, and mark-downs from transactions in penny stocks during each of the immediately preceding three months, and during eleven or more of the preceding twelve months, did not exceed five percent of its total commissions, commission equivalents, mark-ups, and mark-downs from transactions in securities during those months; and

(ii) Who has not been a market maker in the penny stock that is the subject of the transaction in the immediately preceding twelve months.

(2) Transactions in a penny stock, the issuer of which has net tangible assets in excess of: $2,000,000, if the issuer has been in continuous operation for at least three years; or $5,000,000, if the issuer has been in continuous operation for less than three years.

(i) For purposes of paragraph (a)(2) of this section, net tangible assets must be demonstrated by financial statements dated less than fifteen months prior to the date of the transaction that the broker or dealer has reviewed and has a reasonable basis for believing are accurate in relation to the date of the transaction with the person, and:

(A) If the issuer is other than a foreign private issuer, are the most recent financial statements for the issuer that have been audited and reported on by an independent public accountant in accordance with the provisions of 17 CFR 210.2–02 of this chapter; or

(B) If the issuer is a foreign private issuer, are the most recent financial statements for the issuer that have been filed with the Commission or furnished to the Commission pursuant to 17 CFR 240.12g3–2(b) of this chapter; provided, however, that if financial statements for the issuer dated less than fifteen months prior to the date of the transaction have not been filed with or furnished to the Commission, financial statements dated within fifteen months prior to the transaction shall be prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance

[213] 5 U.S.C. 603.

with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction;

(ii) The broker or dealer shall preserve, as part of its records, copies of the financial statements required by paragraph (a)(2)(i) of this section for the period specified in 17 CFR 240.17a–4(b).

(3) Transactions in which the customer is an institutional accredited investor, as defined in 17 CFR 230.501(a)(1), (2), (3), (7) or (8) of this chapter.

(4) Transactions that are not recommended by the broker or dealer.

(5) Transactions in which the purchaser is the issuer of the penny stock that is the subject of the transaction.

(6) Any other transaction or transactions or persons or class of persons that, upon prior written request or upon its own motion, the Commission conditionally or unconditionally exempts by order as consistent with the public interest and the protection of investors.

(b) The following transactions shall be exempt from 17 CFR 240.15g–2, 17 CFR 240.15g–3, and 17 CFR 240.15g–6 of this chapter:

(1) Transactions in a penny stock registered, or approved for registration upon notice of issuance, and that are executed on a national securities exchange that makes transaction reports available pursuant to 17 CFR 240.11Aa3–1 of this chapter.

(2) Transactions in a penny stock authorized, or approved for authorization upon notice of issuance, for quotation in the National Association of Securities Dealers Automated Quotation system (NASDAQ), where the transaction is executed with or by:

(i) A dealer that is registered as a NASDAQ market maker in the penny stock that is the subject of the transaction;

(ii) A broker that is crossing two customer orders as agent; or

(iii) An underwriter or any member of a syndicate or selling group that is participating in a distribution of the penny stock that is the subject of the transaction.

4. By adding 240.15g–2 as follows:

§ 240.15g–2 Risk disclosure document relating to the penny stock market.

It shall be unlawful for a broker or dealer to effect a transaction in any penny stock for or with the account of a customer unless, prior to effecting such transaction, the broker or dealer has furnished to the customer a document containing the information set forth in Schedule 15G, 17 CFR 240.15g–100 of this chapter.

5. By adding 240.15g–3 as follows:

§ 240.15g–3 Broker or dealer disclosure of quotations and other information relating to the penny stock market.

(a) *Requirement.* It shall be unlawful for a broker or dealer to effect a transaction in any penny stock with or for the account of a customer unless such broker or dealer discloses to such customer, within the time periods and in the manner required by paragraph (b) of this section, the following information:

(1) Except as provided in paragraph (a)(2) of this section, with respect to a transaction effected with or for the account of a customer on a principal basis,

(i) The dealer shall disclose its offer price for the security:

(A) If during the previous five days the dealer consistently has effected *bona fide* sales to other dealers at its offer price for the security current at the time of those sales, and

(B) If the dealer reasonably believes in good faith at the time of the transaction with the customer that its offer price accurately reflects the price at which it is willing to sell one or more round lots to another dealer;

(ii) The dealer shall disclose its bid price for the security:

(A) If during the previous five days the dealer consistently has effected *bona fide* purchases from other dealers at its bid price for the security current at the time of those purchases, and

(B) If the dealer reasonably believes in good faith at the time of the transaction with the customer that its bid price accurately reflects the price at which it is willing to buy one or more round lots from another dealer; (iii)

If the dealer's bid or offer prices to the customer do not satisfy the criteria of paragraphs (a)(1)(i) or (a)(1)(ii) of this section, the dealer shall disclose to the customer:

(A) That it has not consistently effected inter-dealer purchases or sales of the penny stock at its bid or offer price, and

(B) The price at which it last purchased the penny stock from, or sold the penny stock to, respectively, another dealer in a *bona fide* transaction;

(iv) For purposes of this paragraph (a)(1), "consistently" shall constitute, at a minimum, seventy-five percent of the dealer's respective *bona fide* interdealer purchase or sales transactions during the previous five-day period.

(2) With respect to transactions effected by a broker or dealer with or for the account of the customer:

(i) On an agency basis; or

(ii) On a basis other than as a market maker in the security, where, after having received an order from the customer to purchase a penny stock the dealer effects the purchase from another person to offset a contemporaneous sale of the penny stock to such customer, or, after having received an order from the customer to sell the penny stock, the dealer effects the sale to another person to offset a contemporaneous purchase from such customer,

the broker or dealer shall disclose the best independent interdealer bid and offer prices for the penny stock that the broker or dealer obtains through reasonable diligence. A broker-dealer shall be deemed to have exercised reasonable diligence if it obtains quotations from three independent dealers (or all dealers if there are fewer than three).

(3) With respect to bid or offer prices and transaction prices disclosed pursuant to paragraph (a) of this section, the broker or dealer shall disclose the number of shares to which the bid and offer prices apply.

(b) *Timing.* The information described in paragraph (a) of this section:

(1) Shall be provided to the customer orally or in writing prior to effecting any transaction with or for the customer for the purchase or sale of such penny stock; and

(2) Shall be given or sent to the customer in writing, at or prior to the time that any written confirmation of the transaction is given or sent to the customer pursuant to 17 CFR 240.10b–10 of this chapter.

(c) *Exemption for Certain Transactions From Pre-Trade Disclosure.* A broker or dealer shall be exempt from the requirements of paragraph (b)(1) of this section if:

(1) The broker or dealer provides the information described in paragraph (a) of this section promptly after effecting a transaction in a penny stock for or with a customer;

(2) At the time the information is provided, the broker or dealer gives the customer, and notifies the customer that the customer has, the unconditional right to cancel the transaction, without monetary penalty, until the end of the business day following the day the customer was provided the information; and

(3) In the written disclosure that the broker or dealer provides to the customer pursuant to paragraph (b)(2) of this section, the broker or dealer notifies the customer of the right of cancellation as specified in paragraph (c)(2) of this section, that the broker or dealer has

provided such right to the customer, orally or in writing, and that the customer has not exercised such right.

(d) *Definitions.* For purposes of this section:

(1) *Bid* shall mean the specified price most recently communicated by the dealer to another broker or dealer at which that dealer is willing to purchase one or more round lots of a penny stock, and shall not include indications of interest;

(2) *Offer* shall mean the specified price most recently communicated by the dealer to another broker or dealer at which that dealer is willing to sell one or more round lots of a penny stock, and shall not include indications of interest.

6. By adding § 240.15g–4 as follows:

§ 240.15g–4 Disclosure of compensation to brokers or dealers.

Preliminary Note: Brokers and dealers may wish to refer to Securities Exchange Act Release No. _____ (date) for a discussion of the procedures for computing compensation in active and competitive markets, inactive and competitive markets, and dominated markets.

(a) *Disclosure Requirement.* It shall be unlawful for any broker or dealer to effect a transaction in any penny stock for or with the account of a customer unless such broker or dealer discloses to such customer, within the time periods and in the manner required by paragraph (b) of this section, the amount of any compensation received by such broker or dealer in connection with such transaction.

(b) *Timing.* The information described in paragraph (a) of this section:

(1) Shall be provided to the customer orally or in writing prior to effecting any transaction with or for the customer for the purchase or sale of such penny stock; and

(2) Shall again be given or sent to the customer in writing, at or prior to the time that any written confirmation of the transaction is given or sent to the customer pursuant to 17 CFR 240.10b–10 of this chapter.

(c) *Exemption for Certain Transactions from Pre-Trade Disclosure.* A broker or dealer shall be exempt from the requirements of paragraph (b)(1) of this section if:

(1) The broker or dealer provides the information described in paragraph (a) of this section promptly after effecting a transaction in a penny stock for or with a customer;

(2) At the time the information is provided, the broker or dealer gives to the customer, and notifies the customer that the customer has, the unconditional right to cancel the transaction, without monetary penalty, until the end of the business day following the day the customer was provided the information; and

(3) In the written disclosure that the broker or dealer provides to the customer pursuant to paragraph (b)(2) of this section, the broker or dealer again notifies the customer of the right of cancellation as specified in paragraph (c)(2) of this section, that the broker or dealer has provided such right to the customer, orally or in writing, and that the customer has not exercised such right.

(d) *Definition of Compensation.* For purposes of this section, "compensation" means, with respect to a transaction in a penny stock:

(1) If the broker is acting as agent for a customer, the amount of any remuneration received or to be received by it from such customer in connection with such transaction;

(2) If, after having received a buy order from a customer, the dealer purchased the penny stock as principal from another person to offset a contemporaneous sale to such customer or, after having received a sell order from a customer, sold the penny stock as principal to another person to offset a contemporaneous purchase from such customer, the difference between the price to the customer and such contemporaneous purchase or sale price; or

(3) If the dealer is otherwise acting as principal for its own account, the difference between the price to the customer and the prevailing market price.

7. By adding § 240.15g–5 as follows:

§ 240.15g–5 Disclosure of compensation of associated persons in connection with penny stock transactions.

(a) *Requirement.* It shall be unlawful for a broker or dealer to effect a transaction in any penny stock for or with the account of a customer unless such broker or dealer discloses to such customer, within the time periods and in the manner required by paragraph (b) of this section, the following information with respect to any associated person of the broker or dealer that is a natural person and has communicated with the customer in connection with the transaction:

(1) The aggregate or per share amount of cash compensation that such associated person has received or will receive from any source in connection with the transaction, where such compensation is determined on a transaction or per share basis; and

(2) The amount of cash or other compensation that such associated person has received from any source during the preceding calendar year in connection with transactions in penny stocks, if such amount exceeded 25 percent of the total amount of compensation received by such associated person during such year in connection with transactions in penny stocks and other securities. *Note:* Payments under reciprocal arrangements whereby compensation is directed to associated persons other than the associated person who has communicated with the customer in an attempt to avoid the disclosure requirements of this section will be considered as compensation that is required to be disclosed under this section.

(b) *Timing.* The information described in paragraph (a) of this section:

(1) Shall be provided to the customer orally or in writing prior to effecting any transaction with or for the customer for the purchase or sale of such penny stock; and

(2) Shall be given or sent to the customer in writing, at or prior to the time that any written confirmation of the transaction is given or sent to the customer pursuant to 17 CFR 240.10b–10 of this chapter.

(c) *Exemption for Certain Transactions from Pre-Trade Disclosure.* A broker or dealer shall be exempt from the requirements of paragraph (b)(1) of this section if:

(1) The broker or dealer provides the information described in paragraph (a) of this section promptly after effecting a transaction in a penny stock for or with a customer;

(2) At the time the information is provided, the broker or dealer gives to the customer, and notifies the customer that the customer has, the unconditional right to cancel the transaction, without monetary penalty, until the end of the business day following the day the customer was provided the information; and

(3) In the written disclosure that the broker or dealer provides to the customer pursuant to paragraph (b)(2) of this section, the broker or dealer notifies the customer of the right of cancellation as specified in paragraph (c)(2) of this section, that the broker or dealer has provided such right to the customer, orally or in writing, and that the customer has not exercised such right.

8. By adding § 240.15g–6 as follows:

§ 240.15g–6 Account statements for purchasers of penny stocks.

(a) *Requirement.* It shall be unlawful for any broker or dealer that has effected the sale to any customer of any penny stock, or any successor of such

broker or dealer, to fail to give or send to such customer a written statement containing the information described in paragraphs (b) and (c) of this section within ten days following the end of each calendar month in which such penny stock is held for the customer's account with the broker-dealer; *Provided, however,* That

(1) If the broker-dealer does not effect any transactions in penny stocks for or with the account of the customer during a period of six consecutive calendar months, then with respect to each quarterly period subsequent to such six-month period in which the broker-dealer does not effect any transactions in penny stocks for or with the account of the customer, the broker-dealer may provide the statements required hereunder on a quarterly basis, within ten days following the end of each such quarterly period; and

(2) This section shall not apply with respect to any period for which an account statement relating to such penny stock would otherwise be required hereunder if, at the end of such period, transactions in such penny stock would be exempted from this section pursuant to 17 CFR 240.15g–1(a)(2) of this chapter.

(b) *Market and Price Information.* The statement required by paragraph (a) of this section shall contain at least the following information with respect to each penny stock covered by paragraph (a) of this section, as of the last trading day of the period to which the statement relates:

(1) The identity and number of shares or units of each such security held for the customer's account, the date or dates of purchase, and the purchase price paid by the customer, inclusive of any mark-up, commission, or other form of broker-dealer remuneration; and

(2) The estimated market value of the security, to the extent that such estimated market value can be determined in accordance with the following provisions:

(i) If the broker-dealer furnishing the statement has effected at least ten separate Qualifying Purchases in the security during the last five trading days of the period to which the statement relates, the weighted average price per share paid by the broker-dealer in all Qualifying Purchases effected during such five-day period, multiplied by the number of shares or units of the security held for the customer's account; or

(ii) If paragraph (b)(2)(i) of this section is not applicable, and if there are at least three Qualifying Bids for the security during the last five trading days of the period to which the statement relates, the average of all such Qualifying Bids as of the end of each day of such five-day period on which any Qualifying Bids are entered, multiplied by the number of shares or units held for the customer's account; or

(iii) If neither paragraph (b)(2)(i) nor (b)(2)(ii) of this section is applicable, a statement that there is "no estimated market value" with respect to the security.

(c) *Legend.* In addition to the information required by paragraph (b) of this section, the written statement shall include a legend, conspicuously displayed, that is identified with the penny stocks described in the statement and that contains the following language:

The market for these securities may be limited. The broker-dealer furnishing this statement may not refuse to accept your order to sell these securities. However, any estimated market values contained in this statement are based on recent purchases by the broker-dealer furnishing the statement, or on bid prices of other broker-dealers, and this information may not serve as a reliable indicator of the price that the customer could obtain in selling the securities. If estimated market values have not been provided for any securities, such values cannot be determined because sufficient purchase or bid information is not available. These securities are subject to payment of commissions or markdowns if they are sold.

(d) *Preservation of Records.* Any broker or dealer subject to this section shall preserve, as part of its records, copies of the written statements required by paragraph (a) of this section and keep such records for the periods specified in 17 CFR 240.17a–4(b) of this chapter.

(e) *Definitions.* For purposes of this section:

(1) *Qualifying Purchases* shall mean *bona fide* purchases by a broker-dealer of a penny stock for its own account, each of which involves at least 100 shares, but excluding any block purchase involving more than five percent of the outstanding shares or units of the security.

(2) *Qualifying Bids* shall mean *bona fide,* interdealer bid quotations at specified prices entered in an interdealer quotation system, as defined in 17 CFR 240.15c2–7(c) of this chapter, by dealers that are market makers in the security to which the quotations apply and that the broker-dealer furnishing the account statement reasonably believes are acting independently of each other and such broker-dealer.

9. By adding § 240.15g–7 as follows:

§ 240.15g–7 Requirements applicable to penny stock market makers.

(a) *Disclosure requirement.* It shall be unlawful for a broker or dealer that is the sole market maker with respect to any penny stock (other than a dealer that is a specialist on a national securities exchange with respect to such security) or any broker or dealer controlling, controlled by, or under common control with, such broker or dealer ("affiliate"), to effect a transaction in such security for or with the account of a customer, unless it discloses to such customer, within the time periods and in the manner required by paragraph (b) of this section, the fact that it or its affiliate is the sole market maker with respect to such security and that, by virtue of such status, it or its affiliate exercises substantial influence over the market for the security, or unless it has reasonable grounds to believe that a market for such security exists other than that made, created, or controlled by it or its affiliate; *Provided,* That for purposes of this section the term "customer" shall not include a broker or dealer.

(b) *Timing of disclosure.* The information described in paragraph (a) of this section:

(1) Shall be provided to the customer orally or in writing, prior to effecting any transaction with or for the customer for the purchase or sale of such penny stock, and

(2) Shall be given or sent to the customer in writing, at or prior to the time that any written confirmation of the transaction is given or sent to the customer pursuant to 17 CFR 240.10b–10 of this chapter.

(c) *Prohibited representations.* It shall be unlawful for a broker or dealer that is a market maker with respect to any penny stock (other than a dealer that is a specialist on a national securities exchange with respect to such security) or an affiliate of such broker or dealer, in connection with a transaction in such security for or with the account of a customer, to make any representation to the customer that such transaction is being effected "at the market" or at a price related to the market price unless it has reasonable grounds to believe that a market for such security exists other than that made, created, or controlled by it or its affiliate.

10. By adding § 240.15g–100 as follows:

§ 240.15g–100 Schedule 15G—Information to be included in the document distributed pursuant to 17 CFR 240.15g–2.

Securities and Exchange Commission
Washington, DC 20549

Schedule 15G

Under the Securities Exchange Act of 1934

Instructions to Schedule 15G

A. The information contained in Schedule 15G ("Schedule") must be reproduced in its entirety. No language of the document may be omitted, added to, or altered in any way.

B. The disclosures made through this document are in addition to any other disclosure(s) that are required to be made under the federal securities laws, including without limitation the disclosures required pursuant to the rules adopted under Sections 15(c)(1), 15(c)(2), and 15(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(c) (1) and (2), and 15 U.S.C. 78o(g), respectively.

C. The format and typeface of the document must be reproduced as presented in the Schedule. The document may be reproduced from the Schedule by photographic copying that is clear, complete, and at least satisfies the type-size requirements set forth below for printing. In the alternative, the document may be printed and must meet the following criteria regarding typeface:

1. Words appearing in capital letters in the Schedule must be reproduced in capital letters and printed in bold-face roman type at least as large as ten-point modern type and at least two points leaded.

2. Words appearing in lower-case letters must be reproduced in lower-case roman type at least as large as ten point modern type and at least two points leaded.

3. Words that are underlined in the document must be underlined in reproduction and appear in bold-faced roman type at least as large as ten point modern type and at least two points leaded, and meet the criteria for lower-case or capital letters in paragraphs (1) and (2) above, whichever is applicable.

D. Recipients of the document must not be charged any fee in connection with the document.

E. The content of the Schedule is as follows:

[next page]

Penny Stock Disclosure Document

This statement is required by the U.S. Securities and Exchange Commission ("Commission"). It contains important information that you should know before you purchase penny stocks.

The securities being sold to you have not been approved or disapproved by the Securities and Exchange Commission. Moreover, the Securities and Exchange Commission has not passed upon the fairness or the merits of this transaction nor upon the accuracy or adequacy of the information contained in any prospectus or any other information provided by an issuer or a broker or dealer.

Generally, a penny stock is an equity security that has the following characteristics:

* it is priced under five dollars;
* it is *not* traded on a national stock exchange;
* it is *not* a security for which there are real-time price and volume reports for each transaction (including most recent sales). Some securities listed or regional exchanges and quoted in NASDAQ, however, fall in this category;
* it may be listed in the "pink sheets";
* it is issued by a company that has less than $5 million in net tangible assets and has been in business less than three years, or by a company that has under $2 million in net tangible assets and has been in business over three years.

Use caution when investing in penny stocks. You should take the following precautions before investing in penny stocks:

1. *Do not make a hurried investment decision.* High-pressure sales techniques can be a warning sign of fraud.

2. *Study the company issuing the stock.* Be wary of companies that have no operating history, few assets, or no defined business purpose. They may be sham or shell companies. Read the prospectus for the company before you invest.

3. *Understand the speculative nature of these stocks.* You should be aware that you may lose part or all of your investment. New companies usually are riskier investments.

4. *Understand all the risks involved.* Be sure that you can afford and are willing to be exposed to such a loss.

5. *Know the brokerage firm and the salespeople with whom you are dealing.* Ask the National Association of Securities Dealers (NASD) or your state securities regulator about the licensing and disciplinary record of the brokerage firm ("broker-dealer") and the sales person contacting you. *A toll-free telephone number is being established* so that you may make this inquiry free of charge.

6. *Make sure you understand how the penny stock market works.* For further information, see below.

Your Rights

Disclosures to you. Under penalty of federal law, your brokerage firm must disclose the following information to you before effecting a penny stock transaction for you and upon confirming that transaction:

* *The bid and offer prices for the penny stock, and the number of shares to which the quoted prices apply.* The bid and offer prices should reflect the price that dealers use when trading the stock among themselves. The inter-dealer price should give you an idea of the fair market value of the stock. If a dealer has not purchased or sold the penny stock at its own bid and offer prices with consistency in the five days prior to the transaction with you, the dealer must disclose that fact to you and must disclose the price at which it last purchased the penny stock from, or sold the penny stock to, another dealer in a *bona fide* transaction. A lack of inter-dealer activity should tell you that the market in the stock is not active and that it may be difficult to resell the stock. You also should be aware that the actual price charged to you for the securities may differ from the price quoted to you for 100 shares. You should therefore determine, before you agree to a purchase, what the actual sales price will be (before the markup) for the exact number of shares you intend to purchase.
* *The markup or commission that the firm will receive as compensation for the transaction with you.* As more fully described below, a markup is the amount a dealer adds to the price of the security in addition to the amount it paid to obtain the security from another dealer or the issuer. A markup is usually intended as an equivalent to a broker's commission on a transaction. A markup is generally calculated from the inter-dealer purchase price, or the offer price to you. Once you learn the markup from the dealer, you should consider that markup in relation to the offer price and determine whether the investment is worthwhile given the dealer's markup charge.
* *The amount and type of compensation that the brokerage firm's salesperson will receive from any source through that transaction with you.* This disclosure must include cash payments and non-cash bonuses, if substantial. The firm must disclose to you, in the aggregate or on a per-share basis, any cash compensation going to the salesperson with whom you are dealing, if the firm makes its calculations on a transactional or per-share basis. The firm also must disclose to you, in the aggregate for the entire preceding calendar year, all cash and non-cash compensation to that salesperson from all of his or her transactions in penny stocks, if that employee did substantial business in penny stocks during such year.

Timing of disclosures to you. Each of these disclosures must be made to you orally or in writing: (1) Before you enter into any contract to purchase or sell penny stock, or (2) after you have entered a contract, only if the broker-dealer then promptly provides the disclosures to you, and if, when making the disclosures, the broker-dealer gives you the unconditional right, until the end of the next business day, to cancel the contract without a monetary penalty to you. The disclosures must also be provided to you in the written confirmation of purchase or sale.

Monthly account statements. In addition to the disclosures noted above, unless you have an account that has been inactive during the past six months, *your brokerage firm must send you a monthly statement* indicating each penny stock held by you, the price you paid, and the market value of each penny stock in your account. If a market value cannot be determined (usually as a result of an inactive market in the stock), your broker must disclose this fact to you.

Legal remedies available to you. If penny stocks are sold to you in violation of the federal securities laws, you may be able to rescind your purchase contract and get your money back. If the stocks are sold in a fraudulent manner, you may be able to sue the source of the fraud for your damages. If you have signed an arbitration agreement, however, you may be required to pursue your claim through arbitration procedures. Because the Commission is not authorized to represent individuals in private litigation, you should contact an attorney in order to pursue a claim that you may have. However, for the protection of yourself and all investors, you should report any perceived violation of the penny stock rules or other securities laws to the Commission, the NASD, or your state

securities administrator. These bodies are empowered to enjoin or otherwise sanction fraudulent and abusive activity of individuals and firms engaged in the securities business. You can contact the Commission or the NASD at the addresses and telephone numbers provided below.

Important Market Information

The penny stock market. Penny stocks tend not to be listed on an exchange or quoted in the NASDAQ system, but rather are traded between dealers on the telephone in the "over-the-counter" market. Often, price information for these securities is not publicly available. Investors in penny stocks may have to rely solely on a broker-dealer to obtain and determine the prices at which they can buy and sell penny stock. In such instances, investors should take extra caution to investigate both the broker-dealer selling the stock and the company issuing the stock to ensure that both are legitimate and that the prices quoted reflect an independent market value.

Market domination. For many penny stocks, there may be only one or two firms dealing in the securities. When there is only one dealer or market maker, or just a few market makers, buying or selling a security, there is a danger that the dealer or group of dealers may control the market in that stock, and, at worst, set prices that are not based on competitive forces. In recent years, some market makers have created artificial markets in certain penny stocks, so that stock prices rose suddenly, but collapsed just as quickly, at a loss to investors. You should ask whether the firm is acting as a broker (your agent) or as a dealer. If the firm is a dealer, ask how many other market makers there are in the security, and attempt to determine whether the firm (or group of firms) dominates the market in the security. A dominated market may result in artificial and arbitrary prices.

Mark-ups and mark-downs. A firm acting as a dealer or market maker in a stock buys and sells the stock for its own account, and may carry an inventory of the stock. When a dealer sells stock to a customer, it adds to the selling price a transaction fee called a "markup." When a dealer purchases from a customer, it subtracts a "markdown" from the bid price. The actual price that the customer pays includes the markup or markdown. Markups and markdowns constitute direct profits for the firm and its salespeople, so an investor should be aware of such amounts to assess the overall value of the trade.

"Bid" and "offer." The bid and offer quotations in a stock are very important information. The offer price is the price at which the dealer is willing to sell you stock. The bid price is the price a dealer is willing to pay for the stock when it purchases from you or another dealer. Find out whether there is both a bid and an offer normally available for the stock. If there is no bid, you may not be able to sell the stock after you buy it, and may suffer a full loss on your purchase.

The "spread." The difference between the bid and offer price is the "spread." Like a markup, the spread is another source of profit for the brokerage firm: the larger the spread, the greater the profit for the firm. A large spread may prove detrimental to an investor. For some penny stocks, the "spread" between the bid and offer may be a significant percentage of the purchase price of the stock. Where the bid price is much lower than the offer price, the market value of the stock must rise substantially before the stock can be sold at a profit. Moreover, an investor may experience substantial losses if the stock must be sold immediately.

Example: If the bid is $0.04 per share and the offer is $0.10 per share, the spread (difference) is $0.06, which appears to be a small amount. But you would lose $0.06 on every share that you bought for $0.10 if you had to sell that stock immediately to the same firm. If you had invested $5,000 at the $0.10 offer price, the market maker's repurchase price, at $0.04 bid, would be only $2,000; thus you would lose $3,000, or more than half of your investment, if you decided to sell the stock. In addition, you would have to pay transaction fees to buy and sell the stock.

Primary offerings. Although most penny stocks are sold to the public through aftermarket trading (that is, the trading that occurs on an ongoing basis after the completion of an initial public offering), occasionally dealers will sell these stocks in initial public offerings ("IPOs"). Special attention should be paid to IPOs of low-priced securities because the market for these securities is untested. Because the offering is on a first-time basis, there is generally no market information about the securities that would allow assessment of their true value. The federal securities laws generally require broker-dealers to provide investors with a prospectus containing information about the objectives, management, and financial condition of the issuer. In the absence of market information, investors should read the company's prospectus with special care to assess whether the securities are a worthwhile investment.

Warning: You have the right to sell a security that you have purchased or own. If a broker-dealer or its representative tells you that you cannot sell your stock, or if the broker-dealer or its representative refuses to take your order to sell your stock, you should consider reporting such activity to your state securities administrator, or to the Commission or the NASD at the addresses provided below, and you should consider seeking legal counsel.

For more information about penny stocks, contact the Office of Filings, Information, and Consumer Services of the U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, (202) 272-7440, or the NASD, 1735 K Street, NW., Washington, DC 20006 (202) 728-8000.

PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

Part 241 of title 17 of the Code of Federal regulations is amended by adding section III. F. of this Release "Statement by the Commission on Disclosure of Compensation of Broker or Dealers in Penny Stocks" to the list of interpretive releases set forth thereunder.

By the Commission.

Dated: April 17, 1991.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-9414 Filed 4-24-91; 8:45 am]

BILLING CODE 8010-01-M

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17 CFR Parts 230 and 240

[Release No. 33-6891; 34-29096; File No. S7-10-91]

RIN 3235-AD54

Blank Check Offerings

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: To implement provisions of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, the Commission today is publishing for comment proposed rules relating to registration statements filed by blank check companies offering penny stock, including requirements to deposit in a special account securities issued and funds received in the offering, restrict trading in deposited securities, disclose information regarding acquisitions by the blank check company, provide purchasers with the right to obtain a refund of deposited funds upon receipt of the information, and require the return of deposited funds to the investors if an acquisition meeting specified criteria have not been made within 18 months after the initial offering date.

DATES: Comments should be received on or before July 19, 1991.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth St., NW., Washington, DC 20549. Comments should refer to File No. S7-10-91. All comments received will be available for public inspection and copying in the Commission's Public Reference Room at the same address.

FOR FURTHER INFORMATION CONTACT: Richard P. Konrath, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth St., NW., Washington, DC 20549, (202) 272-2589.

SUPPLEMENTARY INFORMATION: The Commission is publishing for comment proposed new Rule 419 under the Securities Act of 1933 ("Securities

Act") [1] and new Rule 15g–8 under the Securities Exchange Act of 1934 ("Exchange Act") [2] applicable to registration statements filed by blank check companies offering penny stock, as well as an amendment to Securities Act Rule 174.[3]

I. Executive Summary and Background

One of the purposes of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 ("Penny Stock Reform Act") [4] was to strengthen regulation of securities offerings by blank check companies, which Congress found to have been a common vehicle for fraud and manipulation in the penny stock market.[5] Among other things, the legislation expressly directed the Commission to prescribe special rules with respect to registration statements filed by blank check companies offering penny stock.[6] These rules were intended, at a minimum, to:

(1) Require blank check companies to disclose additional information prior to or after effectiveness of a registration statement;

(2) Place limitations on the use of offering proceeds and the distribution of securities by a blank check company until such disclosure has been made; and

(3) Provide a right to purchasers to obtain a refund of the cash paid for such securities.[7]

The rules proposed today prescribe registration procedures for offerings by blank check companies designed to carry out Congress' goals of assuring adequate disclosure in such offerings and restricting the potential for manipulation in the market for securities issued in such offerings.[8] The Penny Stock Reform Act also mandates adoption of rules regarding secondary market trading in penny stocks, which are addressed in companion rulemaking.[9]

The proposed procedures would not apply to offerings by small businesses other than blank check companies. For example, the proposal would not apply to investments in limited partnerships or other direct participation programs (sometimes called "blind pools") where a detailed plan of business is developed, but specific investment properties are unidentified (*e.g.*, a real estate limited partnership formed to invest in apartment buildings that have not been selected). Likewise, start-up companies with specific business plans would not be within the proposed definition, even though no operations had commenced at the time of the offering.

As more fully discussed below, proposed new Securities Act Rule 419 would require funds received and securities issued in an offering of penny stock by a blank check company to be placed in an escrow or trust account ("Rule 419 Account") until specified conditions have been met. These conditions would include the filing of a post-effective amendment upon consummation of an acquisition if the business or assets being acquired met specified criteria. Purchasers would have the opportunity to have their deposited funds (less certain withdrawals) returned upon receipt of the prospectus describing the acquisition. If these conditions had not been met within 18 months, the funds would be required to be returned to the purchasers.

To further achieve the purposes of the legislation, the Commission also proposes for comment new Exchange Act Rule 15g–8, which would prevent trading of securities of a blank check company held in the Rule 419 Account. Finally, Securities Act Rule 174 would be amended to provide that the statutory prospectus delivery period would not terminate until 90 days following the release of the blank check company's securities from the Rule 419 Account.

II. Discussion of Proposed Rules

A. Scope of Proposed Rule 419

Proposed Rule 419 would apply to every registration statement filed under the Securities Act relating to an offering by a blank check company.[10] "Blank check company" would be defined [11] as a company that (i) is devoting substantially all of its efforts to establishing a new business in which planned principal operations have not commenced, or have commenced but there has been no significant revenue therefrom; [12] (ii) is issuing "penny stock"; and (iii) either has no specific business plan or purpose, or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies. Commenters should address whether the first prong of the definition is necessary since blank check companies generally have no specific business plan or purpose and the company's development stage status is otherwise covered by the third prong of the definition. Comment also is solicited on whether the third prong of the definition should include companies that do not have a specific percentage of offering proceeds, such as 80 percent, committed to a specific business plan or purpose or an identified acquisition, as well as companies with no specific business plan or purpose or identified acquisition.

For purposes of the Rule, the definition of penny stock would be that specified in proposed Rule 3a51–1 under the Exchange Act.[13] This definition would apply only to equity securities, and would not include securities that are "reported securities," as that term is defined in Exchange Act Rule 11Aa3–1(a); [14] securities issued by an

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[1] 15 U.S.C. 77a *et seq.* (1988).

[2] 15 U.S.C. 78a *et seq.* (1988).

[3] 17 CFR 230.174.

[4] S.647, Pub. L. 109–429.

[5] See H.R. Rep. No. 101–617; 101 Cong., 2d Sess. 10–11, 15 (1990). See also *United States* v. *Arthur Packard Condie, et al.*, Litigation Release No. 12390 (February 27, 1990); *SEC v.* Faspag, Inc. et al., Litigation Release No. 12190 (July 31, 1989); *SEC* v. *Stoneridge Securities, Inc. et al.*, Litigation Release No. 11995 (February 13, 1989). State securities regulators have denied registration statement applications by blank check companies in certain instances. See, *e.g.*, *In the Matter of El Cajon Capital, Inc.*, 1989 Utah Sec. LEXIS 22 (March 8, 1989); *In the Matter of the Registration Statement of Eagle Energy Sales, Inc.*, 1989 Utah Sec. LEXIS 52 (February 11, 1989).

[6] See Securities Act Section 7(b) [15 U.S.C. 77g(b) (1990)]. Of the 935 registration statements for initial public offerings filed with the Commission for fiscal year 1990, 191 (20%) were filed by blank check companies.

[7] See H.R. Rep. No. 101–617; 101 Cong., 2d Sess. 23 (1990).

[8] According to the National Association of Securities Administrators' Report on Fraud and Abuse in the Penny Stock Market (September 1989), 36 states use merit review powers to screen out potentially abusive blank check offerings. See, *e.g.*, Rule 31 under the Idaho Securities Act and Rule 101 under the Nevada Securities Act. Congress directed the Commission to refer to state securities law in promulgating its blank check offering rules. See H.R. Rep. No. 101–617, 101 Cong., 2d Sess. 22–23 (1990).

[9] Pursuant to that mandate, proposed Rules 15g–1 through 15g–7 would define the term "penny stock" and require broker-dealers selling penny stocks to provide their customers with a risk disclosure document; monthly statements giving the market value of penny stocks held for the customer; disclosure of market quotations, if any; disclosure of the compensation of the broker-dealer and the salesperson in the trade; and disclosure when the broker-dealer is acting as sole market maker in the security. See Securities Exchange Act Release No. 29093 ("Penny Stock Release") (April 17, 1991).

[10] Proposed Rule 419(a)(1).

[11] Proposed Rule 419(a)(2). This corresponds to the definition of "blank check company" in new section 7(b)(3) of the Securities Act [15 U.S.C. 77g(b)(3)].

[12] Section 7(b)(3) uses the phrase "development stage company." In order to provide clarity, the proposed rule replaces this prong of the definition of "blank check company" by a phrase setting forth the definition of "development stage company" contained in Rule 1–02(h) of Regulation S–X [17 CFR 210.1–02(h)].

[13] Proposed Rule 419(a)(2)(ii). See Penny Stock Release.

[14] 17 CFR 240.11Aa3–1. Generally, reported securities consist of New York Stock Exchange, Inc. ("NYSE"), American Stock Exchange, Inc. ("Amex") and certain regional exchange-listed securities that meet NYSE or Amex listing standards. Reported securities also include securities quoted on the

Continued

investment company registered under the Investment Company Act of 1940; [15] put or call options issued by the Options Clearing Corporation; securities priced at five dollars or more; [16] and securities registered or approved for registration on a national securities exchange that has maintenance criteria authorizing, at a minimum, the delisting of a security whose issuer has less than $2 million in net tangible assets or in stockholder equity.[17]

Commenters are requested to address whether it is appropriate that the definition parallel the definition in proposed Rule 3a51–1, providing for an automatic change in the definition upon amendment of the latter. In addition, comment is specifically requested as to whether the proposed definition is appropriate for a penny stock under proposed Rule 419, or whether other securities should be included or excluded from such definition. For example, comment is solicited as to whether it would be appropriate to exclude from the definition all securities traded on NASDAQ; securities listed on additional registered national securities exchanges; or securities of issuers which have net tangible assets or net worth of a specified amount, such as $2 million or $5 million.

B. Rule 419 Account

1. Deposit of Funds into an Escrow or Trust Account

Proposed Rule 419 would require the proceeds received pursuant to a blank check offering and the securities sold pursuant to the offering to be deposited into an escrow account maintained by an insured depository institution,[18] or a separate bank account established by a broker or dealer registered with the Commission having net capital equal to or greater than $25,000, in which the broker or dealer acts as trustee for persons having beneficial interests in the account.[19] If funds and securities are deposited into an escrow account maintained by an insured depository institution, that institution's deposit account records would be required to specify that funds are held for the named purchasers of the securities in accordance with Section 330.1 of the regulations of the Federal Deposit Insurance Corporation.[20] If funds are deposited in a separate bank account by a broker or dealer acting as a trustee, the books and records of the broker or dealer would be required to indicate the name, address, and interest of each person for whom the account is held to permit prompt return of funds if the terms of the offering were not met.[21]

Cash payable as underwriting commissions, underwriting expenses and dealer allowances could be paid to any underwriter or selling dealer unaffiliated with the registrant in a firm commitment offering or an offering that is not contingent on all of the securities or some minimum amount of the securities being sold or any other contingency. As discussed below, up to ten percent of deposited funds could be released to the registrant in an offering made on other than a contingent basis.

Comment is solicited on any legal or practical limitations to insured depository institutions acting as escrow agents under proposed Rule 419 or to broker-dealers acting as trustees under the proposed Rule. Comment also is solicited on whether other entities should be permitted to act as trustees or escrow agents under proposed Rule 419, and if so, the consequences to purchasers in a blank check offering of permitting other entities to act in this capacity, particularly the adverse consequences, if any, resulting in funds not being available to purchasers if the conditions of the offering are not met. Commenters also are requested to address whether the Rule should require that the broker-dealer separate bank account be with an insured depository institution.

The proposed Rule would require that a copy of the signed escrow or trust agreement be filed as an exhibit to the registration statement and contain specified provisions.[22] First, funds would be required to be sent to the escrow agent or trustee. If the offering was on a firm commitment basis or offered on a basis with no contingencies, purchaser funds, after deducting cash underwriting commissions and expenses and dealer allowances, would be required to be delivered to the Rule 419 Account by the underwriter promptly upon closing of the offering in a firm commitment offering, or otherwise promptly upon receipt of investors' funds.[23] This provision would ensure that unaffiliated underwriters in such offerings receive underwriting fees in accordance with customary business practice with respect to such offerings. However, no deduction could be made for underwriting compensation or underwriting expenses payable to any affiliate of the registrant.

If an offering by a blank check company was made on a contingency basis such as best efforts, all-or-none or a minimum-maximum basis, where the offering terminated if all or a specified minimum number of securities were not sold, all investors' funds would be deposited in the Rule 419 Account, without disbursements of any underwriting commissions, expenses or dealer allowances, pending determination as to whether the conditional terms of the offering were achieved, such as selling a minimum amount of securities, after giving consideration to the investor withdrawal provisions under proposed new Rule 419 as discussed below.[24] Where the specified minimum shares were sold initially but the minimum did not continue to be met because purchasers failed to confirm their

National Association of Securities Dealers, Inc. Automated Quotation System ("NASDAQ") that are designated as National Market System securities.

[15] 15 U.S.C. 80a–1 *et seq.* (1988).

[16] Proposed Rule 3a51–1(d)(2) would provide that if a security is a unit composed of one or more securities, the unit price divided by the number of shares of the unit that are not warrants, options, rights, or similar securities, must be $5 or more and any share of the unit that is a warrant, option, right, or similar security, or a convertible security, must have an exercise price or conversion price of $5 or more.

[17] Currently, such securities include those listed on NYSE, Amex, and the Chicago Board Options Exchange, Inc.

[18] Proposed Rule 419(b)(1). Section 3(c)(2) of the Federal Deposit Insurance Act defines "insured depository institution" to mean any bank or savings and loan association with deposits insured by the Federal Deposit Insurance Corporation. 12 U.S.C. 1813(c)(2) (1991). See also 12 U.S.C. 1813(1) (1991); and 12 U.S.C. 1821 (1991), as well as FDIC 88–47, 1988 FDIC Interp. Ltr. Lexis 47 (July 15, 1988) as to federal deposit insurance governing such accounts.

[19] See Rule 15c3–1 under the Exchange Act [17 CFR 240.15c3–1].

[20] Under Section 330.1 of the regulations of the Federal Deposit Insurance Corporation ("FDIC") [12 CFR 330.1], the deposit account records of the insured bank are conclusive as to the existence of insurance coverage for a deposit. The relationship pursuant to which funds are deposited (*e.g.*, trustee, agent custodian or executor) must be clearly established by the deposit agreement and clearly indicated in the deposit account records to permit a claim for deposit insurance. The details of the relationship and interests of other parties in the account must be ascertainable either from the records of the bank or records of the depositor.

[21] Note to Proposed Rule 419(b)(1).

[22] Proposed Rule 419(b)(2).

[23] Proposed Rule 419(b)(2)(i)(A). The interpretation of "promptly" contained in positions taken by the Division of Market Regulation in the context of Rule 15c2–4 under the Exchange Act would govern under proposed Rule 419. In general, "promptly" means as soon as practicable after receipt of the funds. In most cases, funds should be forwarded to the escrow agent or trustee no later than noon of the next business day following receipt. See Letter from Larry E. Bergmann, Assistant Director, Division of Market Regulation to Linda Wertheimer, Chairman, Subcommittee on Partnerships, Trusts, and Unincorporated Associations, American Bar Association, October 16, 1984.

[24] Proposed rule 419(b)(2)(i)(B).

investments in the blank check company, all purchaser funds and interest or dividends, if any, would be returned promptly to the investor. Thus, in these conditional offerings, no part of the proceeds could be released to the registrant until the Rule 419 Account was terminated as provided in the proposed Rule.[25] This would ensure that funds would be available for return to purchasers if the offering conditions were not met.[26]

The proposed Rule would require the escrow or trust agreement to provide that the funds deposited into a Rule 419 Account and interest or dividends thereon, if any, be held for the sole benefit of the purchaser [27] and that funds be held in either: (1) an obligation that constitutes a "deposit" as that term is defined in Section 3(1) of the Federal Deposit Insurance Act; [28] (2) securities that are direct obligations of, or obligations guaranteed as to principal or interest, by the United States; or (3) securities of any open-end investment company registered under the Investment Company Act of 1940 that holds itself out as a money market fund.[29] Interest earned on deposited funds, if any, likewise would be deposited in the Rule 419 Account and be held for the sole benefit of the purchaser until the investment is confirmed by the purchaser and the Rule 419 Account is terminated, as more fully discussed below.

Comment is solicited on whether additional forms of investment should be permitted under proposed Rule 419. Comment also is requested as to the practical limitations, if any, on arranging with an insured depository institution to maintain account records, particularly for escrow accounts, in accordance with the record requirements of the Federal Deposit Insurance Act. Comment is requested on the practical effects of permitting investments of deposited funds in instruments that may fluctuate in value and may not be easily liquidated at the time of a proposed acquisition, such as government bonds or bills, and the consequences to purchasers in a blank check offering of such investments. Finally, commenters are requested to address whether, if the Rule 419 Account is required to register as an investment company under the Investment Company Act of 1940, the Commission should adopt rules providing an exemption from registration in such instance.

Except in the case of contingent offerings, the proposed Rule would permit the escrow or trust agreement to provide that at any time during the offering up to ten percent of the funds deposited in the Rule 419 Account (exclusive of interest or dividends on deposited funds) may be delivered to the registrant.[30] The purpose of this provision is to provide a registrant with funds that could be used to pay expenses of the offering, including escrow or trust account expenses, and costs associated with the identification of prospects for acquisition or development of business operations. The registrant would be required to account for these funds.[31] Comment is solicited on whether the ten percent allowance is an adequate amount for such purposes or should be increased, *e.g.* to 15 or 20 percent, or whether a lesser amount, such as 2 percent or 5 percent, is sufficient.

The proposed Rule does not permit the use of any deposited funds or the payment of underwriting compensation or expenses in the case of contingent offerings, which parallels existing Exchange Act rules governing such offerings.[32] These rules do not permit the release of funds until the specific conditions of the offering have been met. The Commission requests comment on the necessity to parallel the provisions of Exchange Act Rule 15c2–4 governing the obligations of broker-dealers in contingent offerings. Commenters should address the question as to whether the provision prohibiting the release of any funds from the Rule 419 Account for the payment of commissions or the expenses of the offering, including fees for the trust or escrow account and the expenses of the post-effective amendment, will make it impractical for blank check companies to make contingent offerings and, if so, whether this is a desirable result. For example, if the conditional terms of the offering are met as specified, commenters are requested to address whether funds should be released from the Rule 419 Account and under what conditions, notwithstanding that the conditional terms of the offering may not be satisfied if purchasers subsequently exercise their right to request a refund. Those advocating use of deposited funds by the registrant should discuss why the requirements of Exchange Act Rule 15c2–4 should not govern.

Comment also is requested as to whether disbursements from the Rule 419 Account should be prohibited for all offerings, or just certain offerings such as best-efforts offerings and conditional offerings, by a blank check company before the company has consummated an acquisition or commenced operations, and whether commission payments should be prohibited in all offerings, or just certain offerings such as best-efforts offerings and conditional offerings by a blank check company. Comment also is requested as to whether the rule should limit the registrant's use of disbursed funds.

2. Deposit of Securities in an Escrow or Trust Account

Under the proposed Rule, all securities sold in an offering by a blank check company, as well as securities issued in connection with the offering to underwriters, promoters or others as compensation or otherwise, also would be placed in the Rule 419 Account and subject to the following conditions.[33] The securities would be issued in the name of the purchaser and would remain in that form and held for the sole benefit of purchasers.[34] Voting rights

[25] Where the conditional terms are not satisfied as specified in the offering (e.g. minimum shares to be sold within 90 days), funds would be returned promptly.

[26] If the conditional terms were satisfied as specified in the offering (*e.g.*, the minimum amount of securities must be sold within 90 days), notwithstanding the right of purchasers to request a refund under proposed Rule 419, the requirements of Exchange Act Rule 15c2–4 [17 CFR 240.15c2–4] would be met. Exchange Act Rule 15c2–4 governs a broker-dealer's obligations to escrow funds or hold offering proceeds in a separate bank account if the offering is on a contingent basis until the contingency has occurred. See also Exchange Act Rule 10b–9 [17 CFR 240.10b–9] governing contingent offerings.

[27] Proposed rule 419(b)(2)(ii). Proposed Rule 419(a)(3) defines "purchaser" as any person acquiring securities in the offering, for cash or otherwise, including promoters or others receiving securities as compensation in connection with the offering.

[28] 12 U.S.C. 1813(1)(1991).

[29] Money market funds are open-end management investment companies registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*] that invest in short-term debt instruments. There are currently 710 money market funds with over $538 billion in assets. See IBC/Donoghue's Money Fund Report (Feb. 8, 1991). Most money market funds maintain a stable price of $1.00 per share. The stable $1.00 per share price has encouraged investors to view money market funds as an alternative to bank deposit and checking accounts, even though money market funds lack federal deposit insurance. See Investment Company Act Release No. 18005 (February 20, 1991) [56 FR 8113], at notes 2 and 3.

[30] Proposed Rule 419(b)(2)(iv). The calculation would be based on funds actually deposited in the Rule 419 Account. Registrants would not be permitted to withdraw funds in anticipation of sales of the full offering amount.

[31] Proposed Rule 419(d)(4)(i).

[32] Exchange Act Rule 15c2–4 and Rule 10b–9.

[33] Proposed Rule 419(b)(2)(v).

[34] Upon request by the Commission or its staff, the registrant would be required to furnish to the

Continued

would be exercised in accordance with applicable state law.[35] By the terms of the escrow or trust agreement, deposited securities could not be transferred or disposed of, except by will or the laws of descent and distribution, pursuant to a qualified domestic relations order as defined, or to permit the exercise or conversion of derivative securities held in the escrow or trust account.[36] Comment is requested regarding any practical limitations imposed by the insured depository institution or broker-dealer or otherwise on the deposit and holding of securities in the Rule 419 Account.

The escrow of securities also would be required in those circumstances where the blank check company issues securities for consideraiton other than cash. For example, a blank check company may "spin-off" shares to its shareholders as a dividend. In addition, the proposed Rule requires that securities issued in respect of already deposited securities, for example, securities issued as a result of a stock split or dividend, also be placed in a Rule 419 Account.[37]

Frequently, securities sold by a blank check company are issued in units consisting of common stock and warrants or convertible securities relating to the common stock (*e.g.*, a unit consisting of one share of common stock and two common stock warrants or other derivative securities relating to the common stock).[38] While permitting the exercise or conversion of securities held in a Rule 419 Account, proposed Rule 419 would require the deposit of the securities received upon exercise or conversion, as well as any cash paid in connection with exercise or conversion.[39]

3. Return of Funds to Purchasers After Eighteen Months

The proposed Rule places a time limit on a blank check company's right to retain investor funds in a Rule 419 Account pending acquisition of a business.[40] If funds had not been released from the Rule 419 Account within 18 months from the effective date of the initial registration statement, funds and interest or dividends, if any, would be required to be sent by first class mail or other equally prompt means to purchasers within five business days after expiration of that period. No extension would be permitted.

Comment is solicited on whether this period for release of deposited funds should be shorter or longer, such as 6 or 9 months, one year or two years, and in particular, whether it provides an adequate opportunity for the blank check company to accomplish the objectives of its offering while not unduly prolonging the retention of purchaser funds in the Rule 419 Account. Comment also is solicited on whether upon the passage of a specified time period, such as one year, investors should have the option to have their funds returned or retained by the company for a specified additional period, such as six months.

4. Prohibition on Trading in Deposited Securities

As noted above, the legislative history of the Penny Stock Reform Act recognizes that trading in securities of blank check companies has often involved manipulative activity based on false rumors and abusive broker-dealer sales practices, before an operating business is acquired or the blank check company otherwise develops a business plan.[41] The provisions of proposed Rule 419 are intended to address these practices, in combination with proposed Exchange Act Rule 15g–8, which would prohibit any person from selling or offering to sell a security held in a Rule 419 Account pursuant to the proposed Rule or any interest in or related to such security. Proposed Rule 15g–8 would complement the proposed Rule 419 requirements by prohibiting the sale of securities subject to the proposed Rule 419 transfer restrictions.

Following the initial sale of the blank check company's securities, proposed Rule 15g–8 would prohibit any sale of deposited securities, or interests in these securities until the securities are released from the Rule 419 Account. Therefore, contracts of sale to be satisfied by delivery of the deposited security, such as contracts for sale on a when, as, and if-issued basis, and sale of derivative securities settled by delivery of the security, such as a physically-settled option on the security, would be prohibited by proposed Rule 15g–8 while the securities are in the Rule 419 Account. In addition, the proposed Rule would prohibit sale of other interests based on the deposited security, whether or not physical delivery was required.

Comment is requested as to whether such when-issued trading should be prohibited while the securities are in the Rule 419 Account, and whether other means, either in addition to or instead of the proposed Rule, should be implemented in order to address the manipulative activity in the secondary market for blank check companies.

5. Disclosure in Offering Prospectus

The proposed Rule would require the initial prospectus to describe the obligation of the registrant to deposit funds received and securities issued in connection with the offering in the Rule 419 Account and the restrictions on trading in securities held in the Account or derivative securities or other interests with respect to such securities.[42] This provision of the proposed Rule also would require disclosure of the effect upon purchasers of depositing funds and securities and the ability of purchasers to terminate their investment in the blank check company following receipt of a prospectus that specifies information as to a consummated acquisition. The prospectus would be required to make it clear that investors would not have the right to withdraw their funds except at specified times.[43]

The prospectus also would be required to disclose the specific date on which investors would have the right to withdraw their funds, in order to apprise purchasers as to the length of time their funds and securities will be in the Rule 419 Account. For example, the prospectus for an offering commenced on January 1, 1992 would disclose that if no acquisition had occurred by June 30, 1993, 18 months following the commencement of the offering, all deposited purchaser funds would be sent by first class mail or other equally prompt means to the purchaser no later than July 7, 1993, five business days following the termination of the Rule 419 Account.

C. Post-Effective Amendment For Probable Significant Acquisition

Currently, any registrant, including a blank check company, must file a post-effective amendment to the registration

Commission as supplemental information the names and addresses of purchasers of securities in the Rule 419 Account. Proposed Rule 419(b)(4).

[35] Proposed Rule 419(b)(2)(vi).

[36] Proposed Rule 419(b)(2) (vi) and (vii).

[37] Proposed Rule 419(b)(2)(v).

[38] See, e.g., SEC v. *Guide Energy Inc.*, Litigation Release No. 11821 (July 28, 1988); and *SEC* v. *Centennial Acquisitions, Inc.*, Litigation Release No. 11706 (April 15, 1988).

[39] Proposed Rule 419(b)(2)(vii).

[40] Proposed Rule 419(b)(2)(ix).

[41] See H. Rep. No. 101–617, 101 Cong., 2d. Sess. 10–11 (1990).

[42] Proposed Rule 419(b)(3).

[43] If purchasers receive interest or dividends on deposited funds, the prospectus would be required to set forth the tax effect on the purchaser, including the possibility of having to pay taxes on such income and being required to file an amended tax return to receive a tax refund if ultimately the interest or dividend income is released to the blank check company.

statement if, at any time during the offering, a significant acquisition between the registrant and another company becomes probable.[44] That post-effective amendment must disclose information required by the applicable registration statement form, including financial statements of the registrant and company to be acquired, as well as pro forma financial information required by the form and applicable rules and regulations. The proposed Rule would specify this obligation with respect to a blank check company.[45]

Offerings by blank check companies typically involve the offering of warrants. While the warrants (or other derivative securities) remain unexercised, the registrant is engaged in a continuous offering of the underlying security. Accordingly, when a significant acquisition becomes probable during this period, the registrant must file a post-effective amendment containing the required information.

D. Release of Funds from the Rule 419 Account

1. Post-Effective Amendment Upon Consummation of An Acquisition

Under the proposed Rule,[46] funds could be released from the Rule 419 Account, upon the effectiveness of a post-effective amendment to the blank check company's registration statement filed to reflect consummation of an acquisition of a business or assets, where either the acquisition accounts for at least 80 percent of the deposited proceeds (including any interest) or, if securities are issued in the acquisition, the resulting entity has net tangible assets equivalent to the greater of 80 percent of the deposited proceeds or $100,000. These criteria are intended to ensure that the funds are not released from the Rule 419 Account until the use of proceeds and the business of the blank check company are known with reasonable specificity.

Comment is solicited on whether to permit the release of the deposited funds upon the registrant's development of a specific business plan, or whether the restriction on release of funds should be conditioned on commencement of operations for a specified period, or in some other manner. For example, comment is solicited on whether funds should be permitted to be released from the Rule 419 Account once an acquisition becomes probable [47] or upon execution of a binding agreement for an acquisition subject only to the condition that funds be released from the Rule 419 Account. Further, commenters should address whether the specified size of the acquisition permitting release of funds from the Rule 419 Account should be greater or less, such as an acquisition involving the use of 50 percent or 90 percent of deposited proceeds or, where securities are issued in the acquisition, the resulting entity has pro forma net tangible assets of $50,000 or $150,000. Comment also is requested whether the proposed acquisition criteria should be combined so as to require both the use of a specific percentage of deposited proceeds and a net tangible asset size for any acquisition. Commenters should indicate whether any other criteria besides proceeds and net tangible assets are appropriate, either individually or in combination.

Comment also is solicited on whether there should be a specified minimum which must be met, and if not met all funds must be returned to purchasers. For example, if purchasers holding 30 percent, 50 percent, or 75 percent of the issued securities did not confirm their investment, all funds would be returned to purchasers; or if purchasers representing a fixed dollar amount such as $100,000, $300,000 or $500,000 of offering proceeds or a specific percentage of offering proceeds, such as 30 percent, 50 percent or 75 percent of proceeds, did not confirm, all deposited funds would be returned to purchasers.

2. Information Required in Post-Effective Amendment

The post-effective amendment would be required to contain the following information. First, all information specified by the applicable registration statement form and Industry Guides would be included.[48] That information would include financial statements of the issuer and company to be acquired, as well as pro forma financial information reflecting the acquisition, as specified by the form and applicable rules and regulations. Second, the gross amount of offering proceeds received pursuant to the offering would be required to be disclosed.[49] Third, the registrant would be required to detail the use of funds received, if any, under the terms of the escrow or trust agreement.[50] This disclosure would delineate amounts paid to officers, directors, promoters and others and the reasons for such payments, *e.g.*, compensation, reimbursement of expenses, purchase of assets from such individuals, etc.

Finally, the prospectus would be required to set forth the purchasers' righs and obligations under proposed Rule 419, including, as discussed above, the right to have their deposited funds returned after reviewing the prospectus that sets forth information regarding an acquisition, the time specified by the proposed Rule within which the purchaser must confirm the intent to invest and the time specified in the proposed Rule within which purchaser funds must be returned.[51] A copy of the form of purchaser representation would be required to be be filed as an exhibit to the post-effective amendment.[52] Comment is solicited on whether more or less information should be required in the post-effective amendment than that prescribed in proposed Rule 419. Comment also is solicited both as to other information necessary for the protection of investors, and the registrant's ability to provide the information. Commenters should indicate specifically which information should or should not be required, and the reasons therefore.

The proposed Rule [53] also would require the blank check company to

[44] While offers and sales of securities pursuant to an effective Securities Act registration statement are being made, a post-effective amendment must be filed to reflect any facts or events arising subsequent to effectiveness that represent a fundamental change to the information in the registration statement. See Item 512(a)(1)(ii), Regulation S-K [17 CFR 229.512(a)(1)(ii)]. A significant acquisition or a series of acquisitions that are significant in the aggregate is such a fundamental change. See Securities Act Release No. 6383 (March 16, 1982) [47 FR 11380], text accompanying n.80, 47 at 11396. Generally, during an offering, the registrant must continue to file post-effective amendments to the registration statement to reflect significant acquisitions. Sales of securities must be halted from the time that a significant acquisition becomes probable until a post-effective amendment, including full audited financial statements of the business being acquired and pro forma financial information reflecting the acquisition, is effective. See Rule 3-05 and Article 11 of Regulation S-X [17 CFR 210.3-05, 210.11-01—210.11-03]. "Probable" in the proposed Rule would be interpreted as in Article 11 of Regulation S-X and section 506.02.c.ii of the Financial Reporting Codification [17 CFR 211 (subpart A)].

[45] Proposed Rule 419(c).

[46] Proposed Rule 419(d)(1).

[47] See n. 44, *infra*.

[48] Proposed Rule 419(d)(1). The Securities Act Industry Guides are listed in Regulation S-K, Item 801 [17 CFR 229.801].

[49] Proposed Rule 419(d)(4)(i)(A).

[50] Proposed Rule 419(d)(4)(i)(B). In addition, it should be noted that Form SR under the Securities Act continues to [17 CFR 239.61] require first-time registrants to file with the Commission at specified intervals reports describing its use of offering proceeds. See Rule 463 [17 CFR 230.463].

[51] Proposed Rule 419(d)(4)(i)(C).

[52] Proposed Rule 419(d)(4)(ii).

[53] Proposed Rule 419(d)(6). The registrant, as is currently required, would be subject to Section 15(d) of the Exchange Act for at least the first fiscal year following the effective date of the initial registration statement.

furnish security holders audited financial statements for the first full fiscal year of operations following the effective date of the post-effective amendment, accompanied by a management's discussion and analysis of such information,[54] no later than 90 days after the end of the fiscal year, and file such information under cover of Form 8–K.[55] This provision would ensure that investors in the blank check company have the financial statements and related information for at least a full accounting period following commencement of operations of the company. However, if at the end of its first fiscal year of operations the blank check company were filing reports pursuant to Section 13(a) or 15(d) of the Exchange Act,[56] then this requirement would not be applicable. Comment is solicited on whether this provision is necessary for the protection of purchasers of securities issued by blank check companies, and whether this information should be provided for a longer period of time.

In addition, the blank check company would be required to supplement the prospectus to indicate the date funds and securities were released from the Rule 419 Account in accordance with the provisions of the proposed Rule.[57]

3. Purchaser Confirmation of Investment

Within five business days after the effective date of the post-effective amendment describing the acquisition, the registrant would be required to send by first class mail or other equally prompt means to each purchaser with securities held in the Rule 419 Account a copy of the prospectus contained in the post-effective amendment and any amendment or supplement thereto.[58] The proposed Rule would require the registrant to give each purchaser no fewer than 20 business days and no more than 45 business days from the effective date of the post-effective amendment for the purchaser to either confirm an intent to invest or request a return of funds held in the Rule 419 Account.[59] The purchaser would confirm the investment by furnishing the escrow agent or trustee within the prescribed time period a signed representation stating the intention to continue investiment.[60] If the purchaser did not furnish the confirmation within the prescribed time period, deposited funds, including any interest or dividends (less funds disbursed to the registrant by the terms of the escrow or trust agreement and funds paid to unaffiliated underwriters for commissions and expenses, if permitted),[61] would be sent to the purchaser by first class mail or equally prompt means within five business days. Comment is solicited on whether the time periods within which to confirm an investment as prescribed in proposed Rule 419 should be expanded or contracted, such as a minimum of 15 or 25 business days or a maximum of 30 or 60 business days.

4. Release of Funds and Securities From the Rule 419 Account

Funds deposited in the Rule 419 Account plus interest or dividends, if any, would be released by the escrow agent or trustee to the registrant and deposited securities would be released by the escrow agent or trustee to the purchaser if the following occurred.[62] First, the escrow agent or trustee would have to receive from the registrant a signed representation, together with other evidence acceptable to the escrow agent or trustee, that the post-effective amendment requirements regarding the consummation of an acquisition have been met. Such other evidence could include a copy of the Commission order declaring the post-effective amendment effective. Comment is requested as to whether the Rule should specify the other evidence required to be furnished to the escrow agent or trustee and, if so, the nature of the evidence to be specified. Second, the escrow agent or trustee also would have to receive a signed representation from the purchaser confirming an intention to continue the investment following receipt of the post-effective amendment.

Once the registrant and the purchaser complied with all conditions for release of funds from the Rule 419 Account, all funds would be released to the registrant. The Rule 419 Account would not continue. Accordingly, the registrant would not be limited to obtaining only enough funds for the specific acquisition made, but would have the remaining funds for future acquisitions or operations.

As discussed above, if the required signed representation from a purchaser were not received by the escrow agent or trustee within the specified time periods, those funds would be returned to the purchaser and the securities returned to the registrant.[63] If all funds have not been released to the registrant within 18 months from the effective date of the registration statement, the deposited funds (less permitted withdrawals) would have to be returned to the purchaser, regardless of whether the 20–45 day period for purchaser confirmation of the investment [64] had commenced but had not terminated.[65] Comment is solicited on whether additional requirements for the release of funds from the Rule 419 Account should be imposed. In addition, comment is solicited on whether the Rule should provide investors with the right to withdraw at any time until the conditions for release of funds from the Rule 419 Account were met.

E. Proposed Amendment to Rule 174

Rule 174 under the Securities Act prescribes prospectus delivery requirements with respect to transactions subject to Section 4(3) of the Securities Act.[66] Under Section 4(3), transactions by dealers are exempt from the prospectus delivery and other requirements of Section 5 of the Securities Act unless those transactions are within 40 days of the date securities were first offered to the public, or 90 days if the securities have not been sold previously pursuant to an earlier effective registration statement. Under the proposal, new paragraph (g) would be added to Rule 174 to provide that with respect to offerings by blank check companies subject to Rule 419, the prospectus delivery period would not terminate until 90 days after the release of funds and securities from the Rule 419 Account.[67] Comment is solicited on whether it is appropriate to trigger the time period from the date funds are released from the Rule 419 Account or whether an alternative trigger date should be provided.

III. General Request for Comment

Any interested persons wishing to submit written comments on the proposed rule amendments that are the subject of this release, to suggest additional changes, or to submit comments on other matters that might have an impact on the proposals contained herein, are requested to do so. Commenters are requested to address both whether the proposals achieve the purposes of the Penny Stock Reform Act

[54] Item 303 of Regulation S–K [17 CFR 229.303].
[55] 17 CFR 249.308.
[56] 15 U.S.C. 78m(a) (1988); 15 U.S.C. 78*o*(d) (1988).
[57] Proposed Rule 419(d)(5).
[58] Proposed Rule 419(d)(2).
[59] Proposed Rule 419(d)(3).
[60] *Id.*
[61] *Id.*
[62] Proposed Rule 419(b)(2)(viii).
[63] Proposed Rule 419(d)(3).
[64] *Id.*
[65] Proposed Rule 419(2)(ix).
[66] 15 U.S.C. 77d(3) (1988).
[67] Proposed Rule 174(g).

in providing protection to investors and whether the procedures established by the rule are practicable for registrants. The Commission further requests comment on any competitive burdens that might result from adoption of the Rule. Comments on this inquiry will be considered by the Commission in complying with its responsibilities under Section 23(a) of the Exchange Act.[68]

IV. Cost-Benefit Analysis

While some additional costs to registrants and broker-dealers may result from the proposals, such costs may be outweighed by the benefit of investor protection in blank check offerings envisioned by the Penny Stock Reform Act. Specific comment is solicited on costs that would be incurred by registrants and broker-dealers, including the cost of maintaining the escrow or trust account.

V. Summary of the Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA"), pursuant to the requirements of the Regulatory Flexibility Act,[69] regarding the proposed rules. The IRFA indicates that proposed rules could impose some additional costs on small broker-dealers and small issuers. The rules, however, are designed to minimize these costs to the greatest extent possible while meeting the requirements concerning blank check offering under the Penny Stock Reform Act. A copy of the IRFA may be obtained from Richard P. Konrath, Attorney-Advisor, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 3–12, Washington, DC 20549, (202) 272–2589.

VI. Statutory Basis

New Rule 419 and the amendment to Rule 174 are being proposed by the Commission pursuant to sections 3,[70] 4,[71] 5,[72] 7,[73] and 19[74] of the Securities Act. New Rule 15g–8 is being proposed pursuant to sections 3,[75] 9,[76] 10,[77] 15,[78] and 23[79] of the Exchange Act.

[68] 15 U.S.C. 78w(a) (1988).
[69] 5 U.S.C. 603 (1988).
[70] 15 U.S.C. 77c (1988).
[71] 15 U.S.C. 77d (1988).
[72] 15 U.S.C. 77e (1988).
[73] 15 U.S.C. 77g (1988).
[74] 15 U.S.C. 77s (1988).
[75] 15 U.S.C. 78c (1988).
[76] 15 U.S.C. 78i (1988).
[77] 15 U.S.C. 78j (1988).
[78] 15 U.S.C. 78o (1988).
[79] 15 U.S.C. 78w (1988).

List of Subjects in 17 CFR Parts 230 and 240

Advertising, brokers, confidential business information, fraud, investment companies, reporting and recordkeeping requirements, and securities.

VII. Text of Proposals

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulation is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77e, 77f, 77g, 77h, 77j, 77s, 77sss, 78o, 78*l*, 78m, 78n, 78o, 78w, 79t, and 80a–37, as amended, unless otherwise noted.

2. By amending § 230.174 by adding paragraph (g) to read as follows:

§ 230.174 Delivery of Prospectus By Dealers; Exemptions under section 4(3) of the Act.

* * * * *

(g) If the registration statement relates to an offering of securities of a "blank check company," as defined in Rule 419 under the Act [17 CFR 230.419], the statutory period for prospectus delivery specified in section 4(3) of the Act shall not terminate until 90 days after the date funds and securities are released from the escrow or trust account pursuant to Rule 419 under the Act.

3. By adding § 230.419 to read as follows:

§ 230.419 Offerings by Blank Check Companies.

(a) *Scope of the rule.* (1) The provisions of this Rule shall apply to every registration statement filed under the Act relating to an offering by a blank check company.

(2) For purposes of this Rule, the term "blank check company" shall mean a company that:

(i) Is devoting substantially all of its efforts to establishing a new business in which planned principal operations have not commenced; or, planned principal operations have commenced, but there has been no significant revenue therefrom;

(ii) Is issuing "penny stock," as defined in Rule 3a51–1 [17 CFR 240.3a51–1] under the Securities Exchange Act of 1934 ("Exchange Act"); and

(iii) Has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies.

(3) For purposes of this Rule, the term "purchaser" shall mean any person acquiring securities in the offering, for cash or otherwise, including promoters or others receiving securities as compensation in connection with the offering.

(b) *Deposit of Securities and Proceeds in an Escrow or Trust Account.* (1) All securities issued in connection with an offering by a blank check company and the gross proceeds from the offering, except as provided in paragraph (b)(2)(i)(A) of this section, shall be deposited promptly into:

(i) An escrow account maintained by an "insured depository institution," as that term is defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2) (1991)); or

(ii) A separate bank account established by a broker or dealer registered under the Securities Exchange Act of 1934 maintaining net capital equal to or exceeding $25,000 (as calculated pursuant to Exchange Act rule 15c3–1 (17 CFR 240.15c3–1)), in which the broker or dealer acts as trustee for persons having beneficial interests in the account.

Note: (1) If funds and securities are deposited into an escrow account maintained by an insured depository institution, the deposit account records of the insured depository institution must provide that funds in the escrow account are held for the benefit of the named purchasers in accordance with § 330.1 of the regulations of the Federal Deposit Insurance Corporation (12 CFR 330.1) and the records of the escrow agent, maintained in good faith and in the regular course of business, must show the name and interest of each purchaser in the account.

(2) If funds and securities are deposited in a separate bank account by a broker or dealer acting as a trustee, the books and records of the broker-dealer must indicate the name, address, and interest of each person for whom the account is held.

(2) The executed escrow or trust agreement shall be filed as an exhibit to the registration statement and shall contain the following provisions:

(i) Funds, in the form of checks, drafts, or money orders payable to the order of the escrow agent or trustee, shall be sent to the escrow agent or trustee as follows:

(A) In a firm commitment offering or an offering with no contingencies, all offering proceeds, after deduction of cash paid for underwriting commissions, underwriting expenses and dealer allowances, shall be deposited promptly into the escrow or trust account required by this section upon closing of the offering or upon sale of the securities;

Provided, however, That no deduction may be made for underwriting commissions, underwriting expenses or dealer allowances payable to an affiliate of the registrant.

(B) In a contingent offering, including but not limited to offerings on an all-or-none or minimum-maximum basis, all offering proceeds, without any deductions, shall be deposited promptly into the escrow or trust account required by this section upon sale of the securities, and the escrow or trust agreement shall provide that all offering proceeds will be returned promptly to purchasers and no funds may be released to the registrant unless both the conditional terms of the offering and the provisions of paragraph (b)(2)(viii) of this section are met;

(ii) The escrow or trust agreement shall provide that deposited funds and interest or dividends thereon, if any, shall be held for the sole benefit of the purchasers of the securities. The funds held in trust or escrow shall be invested in one of the following:

(A) An obligation that constitutes a "deposit," as that term is defined in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(1)(1991));

(B) Securities that are direct obligations of, or obligations guaranteed as to principal or interest by, the United States; or

(C) Securities of any open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et. seq.*) that holds itself out as a money market fund meeting the conditions of paragraphs (c)(2), (c)(3), and (c)(4) of Rule 2a–7 (17 CFR 270.2a–7) under the Investment Company Act.

(iii) Interest or dividends earned on the funds, if any, shall be held in the escrow or trust account until the funds are released in accordance with the provisions of this section. If funds held in the escrow or trust account are released to a purchaser of the securities, the purchasers shall receive interest or dividends earned, if any, on such funds up to the date of release. If funds held in the escrow or trust account are released to the registrant, interest or dividends earned on such funds up to the date of release may be released to the registrant.

(iv) The registrant may receive up to 10% of funds deposited into the escrow or trust account, exclusive of interest or dividends, as funds are deposited into the escrow or trust account, if the offering is made in accordance with paragraph (b)(2)(i)(A) of this section.

(v) All securities issued in connection with the offering, whether or not for cash consideration, and any other securities issued with respect to such securities, including securities issued with respect to stock splits, stock dividends, or similar rights, shall be deposited directly into the escrow or trust account promptly upon issuance. The identity of the purchaser of the securities shall be included on the stock certificates or other documents evidencing such securities.

(vi) Securities held in the escrow or trust account are to remain as issued and deposited and shall be held for the sole benefit of the purchaser, who shall have the voting rights, if any, with respect to securities held in their name provided by applicable state law. No transfer or other disposition of securities held in the escrow or trust account or any interest related to such securities shall be permitted other than by will or the laws of descent and distribution, or pursuant to a qualified domestic relations order as defined by the Internal Revenue Code of 1986 as amended (26 U.S.C. 1 *et seq.*), or Title 1 of the Employee Retirement Income Security Act (29 U.S.C. 1001 *et seq.*), or the rules thereunder.

(vii) Warrants, convertible securities or other derivative securities relating to securities held in the escrow or trust account may be exercised or converted in accordance with their terms; *Provided, however,* That securities received upon exercise or conversion are promptly deposited into the escrow or trust account together with any cash paid in connection with the exercise or conversion.

(viii) Funds placed in the escrow or trust account may be released to the registrant and securities may be delivered to the purchaser or other registered holder identified on the deposited securities only after the escrow agent or trustee has received:

(A) A signed representation, together with other evidence acceptable to the escrow agent or trustee, from the registrant that the provisions of paragraph (d)(1)–(4) of this section have been met; and

(B) A signed representation from the purchaser confirming an intention to invest following receipt of the prospectus required to be furnished pursuant to paragraph (d)(2) of this section.

(ix) Funds held in the escrow or trust account with interest or dividends, if any, shall be sent by first class mail or equally prompt means to the purchaser within five business days following 18 months after the effective date of the initial registration statement for the offering, if the requirements of paragraph (b)(2)(viii) of this section have not been met.

(3) The initial registration statement shall disclose the specific terms of the offering, including, but not limited to:

(i) The terms and provisions of the escrow or trust agreement and the effect thereof upon the registrant's right to receive funds and the effect of the escrow or trust agreement upon the purchaser's funds and securities required to be deposited into the escrow or trust account; and

(ii) The obligation of the registrant to provide, and the right of the purchaser to receive, information regarding an acquisition, including the requirement that pursuant to this section, purchasers confirm in writing their investment in the registrant's securities as specified in paragraph (d) of this section to remain an investor. The disclosure should specify the time periods specified in paragraph (d)(3) of this section based upon the effective date of the registration statement.

(4) Upon request by the Commission or its staff, the registrant shall furnish to the Commission as supplemental information the names and addresses of purchasers of securities held in the escrow or trust account.

(c) *Probable Acquisition post-effective amendment requirement.* If, during any period in which any offers or sales are being made, a significant acquisition becomes probable, the registrant shall file promptly a post-effective amendment disclosing the information specified by the applicable registration statement form and Industry Guides, including financial statements of the registrant and the company to be acquired as well as pro forma financial information required by the form and applicable rules and regulations. Where warrants, rights or other derivative securities issued in the initial offering are exercisable, there is a continuous offering of the underlying security.

(d) *Release of deposited securities and funds.* (1) The registrant shall file promptly a post-effective amendment upon consummation of an acquisition of a business or assets that will constitute the business (or a line of business) of the registrant and accounts for at least 80 percent of the deposited proceeds, including any interest or dividends, or, where securities are issued in the acquisition, the resulting entity has net tangible assets equivalent to the greater of 80 percent of the deposited proceeds or $100,000. The post-effective amendment shall disclose all information specified by the applicable registration statement form and Industry Guides, including financial statements of the registrant and the company acquired or to be acquired and pro

forma financial information required by the form and applicable rules and regulations.

(2) Within five business days after the effective date of the post-effective amendment(s) required by paragraph (d)(1) of this section, the registrant shall send by first class mail or other equally prompt means, to each purchaser of securities held in escrow or trust, a copy of the prospectus contained in the post-effective amendment and any amendment or supplement thereto.

(3) Each purchaser shall be given no fewer than 20 business days and no more than 45 business days from the effective date of the post-effective amendment to notify the escrow agent or trustee in writing that the purchaser elects to remain an investor. If the escrow agent or trustee has not received such written notification by the 45th business day following the effective date of the post-effective amendment, funds and interest or dividends, if any, held in the escrow or trust account shall be sent by first class mail or other equally prompt means to the purchaser within five business days.

(4) The post-effective amendment filed pursuant to paragraph (d)(1) of this section shall:

(i) Disclose the terms of the offering, including but not limited to:

(A) The gross offering proceeds received to date, specifying the amounts paid for underwriter commissions, underwriting expenses and dealer allowances, amounts disbursed to the registrant, and amounts remaining in the escrow or trust account;

(B) The specific amount, use and application of funds disbursed to the registrant to date, including, but not limited to the amounts paid to officers, directors, promoters, controlling shareholders or affiliates, either directly or indirectly, specifying the amounts and purposes of such payments; and

(C) A description of the purchaser's rights provided in paragraph (d)(3) of this section and the date funds will be returned to the purchaser unless a written statement confirming the investment has been received; and

(ii) Include as an exhibit a form of the purchaser representation required by paragraph (b)(2)(viii)(B) of this section.

(5) The registrant shall supplement the prospectus to indicate the date funds and securities are released from the escrow or trust account in accordance with paragraph (b)(2)(viii) of this section and the amount of funds and securities released.

(6) The registrant shall:

(i) Furnish to security holders audited financial statements for the first full fiscal year of operations following the effective date of the post-effective amendment, together with the information required by Item 303 of Regulation S–K (17 CFR 229.303), no later than 90 days after the end of such fiscal year; and

(ii) File the financial statements and additional information with the Commission under cover of Form 8–K (17 CFR 249.308); *Provided, however,* That such financial statements and related information need not be filed separately if the registrant is filing reports pursuant to section 13(a) or 15(d) of the Exchange Act.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77s, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 79q, 79t, 80a–29, 80a–37, unless otherwise noted.

5. By adding § 240.15g–8 to read as follows:

§ 240.15g–8 Sales of Escrowed Securities of Blank Check Companies

As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, it shall be unlawful for any person to sell or offer to sell any security that is deposited and held in an escrow or trust account pursuant to Rule 419 under the Securities Act of 1933 (17 CFR 230.419), or any interest in or related to such security, other than pursuant to a qualified domestic relations order as defined by the Internal Revenue Code of 1986, as amended (26 U.S.C. 1 *et seq.*), or Title I of the Employee Retirement Income Security Act (29 U.S.C. 1001 *et seq.*), or the rules thereunder.

By the Commission.

Dated: April 17, 1991.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–9417 Filed 4–24–91; 8:45 am]

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Thursday
April 25, 1991

Part III

Department of Housing and Urban Development

24 CFR Parts 203 and 234

Mutual Mortgage Insurance and Rehabilitation Loans; Miscellaneous Amendments; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Parts 203 and 234

[Docket No. R-91-1509; FR-2853-P-01]

RIN 2502-AF02

Mutual Mortgage Insurance and Rehabilitation Loans; Miscellaneous Amendments

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule describes miscellaneous amendments to current regulations governing actions by mortgagees with respect to insured mortgages in default. The purpose of the rule is to improve the efficiency of the Single Family Mortgage Insurance Program.

DATES: Comments due date: June 24, 1991.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Office of the General Counsel, Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m.–5:30 p.m. eastern time) at the above address. As a convenience to commenters, the Rules Docket Clerk will accept brief public comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 708–4337. (This is not a toll-free number.) Only public comments of six or fewer total pages will be accepted via FAX transmittal. This limitation is necessary to assure reasonable access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Rules Docket Clerk at (202) 708–2084. (This is not a toll-free number.)

FOR FURTHER INFORMATION CONTACT: Joseph Bates, Acting Director, Single Family Servicing Division, room 9178, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; (202) 708–1672 or, for hearing and speech-impaired, (202) 708–4594. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. Introduction

This rule proposes various amendments to the regulations governing FHA-insured mortgages for single family homes, authorized by title II of the National Housing Act (the Act). Under the FHA Program, home mortgages are insured through revolving funds, which provide the money to pay insurance claims to lenders upon default on the mortgages. The funds are replenished by insurance premiums paid by mortgagors to obtain the insurance, and by income from the investment of proceeds from the sales of homes that HUD acquires upon payment of insurance claims to the lenders.

Today's rule would amend several regulations governing mortgagees' obligations with regard to foreclosures, claims for insurance benefits, and preservation and maintenance of properties upon default by mortgagors. The purpose of these amendments is to improve the efficiency of the program, thereby protecting the insurance funds and assuring the availability of the program for use by future homebuyers. In developing the final rule, HUD will analyze public comments and all other available data to assure the effectiveness of the proposed changes in improving the efficiency of the program.

II. Proposed Rule

1. Commencement of Foreclosure Action Upon Default

Upon default by a mortgagor, HUD's current regulations (24 CFR 203.355) require the mortgagee to commence foreclosure (or to obtain a deed in lieu of foreclosure) within one year from the date of default. The Department is proposing that § 203.355 be amended to shorten the time within which to commence foreclosure to six months from the date of default. A waiting period of one year is atypical in the home mortgage industry, and is very costly to the insurance fund in time lost in recouping the loss to the fund by selling the property. The lost time represents lost investment income that would be generated by the proceeds from the subsequent sale of the property by HUD. At the same time, debenture interest is computed and paid to mortgagees from the date of default for mortgages insured after September 2, 1964, which make up the majority of mortgages in default.

The Department believes that the shorter period of six months would not place any extra burden on mortgagees, and would be beneficial in terms of both replenishing the insurance fund and preventing excessive loss to it. The interests of the mortgagor are protected by special forbearance and assignment programs. However, during the public comment period, the Department will be compiling statistics on the number of foreclosures commenced before the current one-year deadline. This data will help determine the time frame within which the majority of foreclosures are commenced. The Department also invites comments from mortgagees addressing any reasons that the shorter six-month deadline cannot reasonably be met. Mortgagees are requested to be specific as to the reasons.

Additionally, the Department is proposing to amend § 203.355 further, with respect to defaulted mortgages on vacant or abandoned property. If the mortgagee discovers, within the first five months after default, that the property is vacant or abandoned, the time period would be shortened; and the mortgagee would be required to commence foreclosure within 30 days after the date the property is discovered, or should have been discovered, to be vacant or abandoned. Vacant or abandoned property is often the target of vandalism and theft, presenting mortgagees with special problems associated with preserving the property. HUD believes that unnecessarily delaying foreclosure in such a situation contributes to the damage suffered by the property.

Section 203.377, which requires that mortgagees take reasonable action to protect and preserve vacant or abandoned property until it is conveyed to HUD, would also be amended to provide that "reasonable action" would include initiation of foreclosure within 30 days after the property is discovered to be vacant or abandoned. Section 203.606(b) would also be amended to provide for the 30-day limitation on vacant or abandoned property.

Section 203.355 would continue to recognize that the time limits prescribed by the proposed amendments may be prohibited by the laws of the State in which the property is situated. The current regulation requires that foreclosure action be commenced within 60 days after the expiration of the delay period required by State law. This rule would change the time allowed for commencing the action to 30 days. This shortened period would seek to minimize any further damage caused by the delay required by State law, and would not be an undue burden on mortgagees, since the waiting period

prescribed by State law affords ample time to prepare the action.

Other changes to § 203.355 proposed in this rule are organizational only and do not affect the substantive content of the regulation.

2. Completion of Foreclosure and Conveyance to the Secretary

Under 24 CFR 203.356, mortgagees are required to give written notice to HUD within 30 days after instituting foreclosure proceedings, and to exercise reasonable diligence in completing the proceedings. The Department is proposing additional language to § 203.356 to extend the requirement to exercise reasonable diligence to acquiring title to and possession of the property once the foreclosure proceedings have been completed. Acquiring title to and possession of the property are the final steps to be taken by the mortgagee before conveyance of the property to the Secretary. Some mortgagees in the past have delayed unnecessarily in following through to this ultimate goal. The delays create the same situation described above, *i.e.*, lost investment income while HUD pays debenture interest. This rule would emphasize the importance of these actions by extending the reasonable diligence requirement to them.

The Secretary has notified mortgagees of the time frame established for each State as constituting "reasonable diligence" in completing foreclosure (Mortgagee Letter 90–30, August 14, 1990). This notification would be updated to include, for each State, the additional time established as constituting "reasonable diligence" in acquiring title to, or possession of, the property.

Current regulations require the mortgagee to convey the property to the Secretary within 30 days after acquiring good marketable title to and possession of the property, or within such further time as may be necessary to complete the title examination and perfect the title (24 CFR 203.359). Since HUD has no control over the length of time mortgagees take to complete the title examination, the process of conveyance to HUD is further delayed. This rule would amend § 203.359 to require that a mortgagee transfer the property to the Secretary within 30 days of the later of the (1) recording date of the foreclosure deed; (2) recording date of the deed in lieu of foreclosure; (3) acquiring possession of the property; or (4) expiration of the redemption period. Failure to meet the 30-day limitation would result in the curtailment of debenture interest under § 203.402(k)(1). The rule would also provide that, if the title is defective and the mortgagee cannot meet the 30-day deadline, as described above, the mortgagee would be allowed 90 days from the later of one of the listed events within which to correct the title and convey the property to the Secretary. Failure to meet the 90-day deadline would result in the termination of the insurance contract.

Because this rule would provide that the insurance contract will terminate if the time limitations are not met, § 203.391, which authorizes a reduction in insurance benefits considered adequate to compensate for loss to the insurance fund as a result of property conveyed with a defective title, would be removed.

3. Repair of Damage and Preservation of Property by Mortgagee

Under § 203.378, with regard to mortgages insured on or after January 1, 1977, the mortgagee is responsible for damage to vacant and abandoned property on which the loan is in default, when the damage is due to the mortgagee's failure to preserve and protect the property, as required by § 203.377. Under § 203.379, the mortgagee must, before conveyance, repair any damage caused by fire, flood, earthquake, or tornado, and with respect to mortgages insured on or after January 1, 1977, repair any damage caused by the mortgagee's failure to take action to protect and preserve vacant and abandoned property. However, upon HUD approval, the mortgagee may convey the property to HUD in an unrepaired condition, and HUD will deduct from the insurance benefits due the mortgagee the estimated cost of repairing the property or the amount of any hazard insurance recovery received by the mortgagee, whichever is greater.

Section 136(a) of the Department of Housing and Urban Development Reform Act of 1989 amended section 204(a) of the Act to require mortgagees, as a condition of the receipt of insurance benefits, to maintain or assure the maintenance of the property while it is in the possession of the mortgagee. The Department interprets section 136(a) as congressional intent to strengthen HUD's position with regard to property conveyed in an unrepaired condition. The decline in the fair market value of the property caused by its condition is often greater than the reduction in the insurance claim, causing the Department to recoup less for the insurance fund than it would have if the mortgagee had maintained the property while it was in the mortgagee's possession.

This rule would amend § 203.378 to provide that, for mortgages insured on or after the effective date of the rule, the mortgagee would be responsible for any damage, of whatsoever nature, to the property while the property is in the possession of the mortgagee. Language would be added to § 203.379 to assure its application only to mortgages insured before the effective date of this rule, and a new § 203.379a would be added to apply to mortgages insured on or after the effective date of this rule.

Under the proposed § 203.379a, before conveying property to the Secretary, mortgagees must repair any damage to the property that occurs while the property is in the possession of the mortgagee, unless the Secretary approves conveyance of the property in a damaged condition. If the Secretary approves such a conveyance, the estimated cost of repair or any insurance recovery received by the mortgagee, whichever is greater, would be deducted from the insurance claim. An additional charge for administrative costs incurred by HUD in connection with the damaged property would also be deducted from the claim. In the event a mortgagee conveys damaged property to the Secretary without approval, the Secretary would have the option of reducing the claim by the estimated cost of repair or insurance recovery, plus administrative costs, or reconveying the property to the mortgagee. Mortgagees would be given 90 days, or additional time if necessary and approved by the Secretary, within which to repair the property and reconvey it to the Secretary. If the mortgagee fails to meet the 90-day time limitation, or any additional time approved by the Secretary, the insurance contract would be terminated.

With regard to this proposed change, the Department invites comments on the amount of damage to property that is caused by vandalism and, specifically, the type of vandalism, its cost to repair, and any other information on damages caused by vandalism that the commenters believe would be helpful in developing a reasonable approach to this problem.

(Under 24 CFR 234.255, the provisions of §§ 203.251 through 203.436 are applied to mortgages insured under section 234(c) of the Act, with certain listed exceptions. Two of the exceptions are §§ 203.378 and 203.379. This rule would amend § 234.255 to except § 203.379a as well.)

4. Deficiency Judgments

On February 16, 1988 (53 FR 4384), HUD published a final rule authorizing it to require mortgagees to obtain deficiency judgments in connection with the foreclosure of mortgages insured

pursuant to firm commitments issued on or after March 28, 1988, and, with respect to mortgages insured before that date, to request mortgagees to obtain deficiency judgments. That rule (24 CFR 203.369) identified specific criteria used by HUD in determining which mortgagors should be pursued for judgments.

Since early 1989, nearly all mortgagors targeted for deficiency judgments have been investors, *i.e.*, nonoccupant-owners. The only owner-occupants pursued have been a portion of the category known as "walkaways"—mortgagors whose abandonment of their properties and financial obligations was for the sake of convenience, and whose default occurred despite their continued ability to pay the mortgage. Today's document proposes to remove the criteria in § 203.369 for determining which mortgagors may be pursued for deficiency judgments, and to propose that any defaulting mortgagor may potentially be pursued for a deficiency judgment.

Experience with the existing regulation for more than a year has led the Department to believe that a case-by-case determination is a fair and rational method for selecting mortgagors who should be pursued for deficiency judgments. In determining which mortgagors would be pursued for deficiency judgments, the Department would still consider feasibility under State law and cost-effectiveness, but the main factor that should be considered in such cases is whether the mortgagor still retains significant assets or income after foreclosure and can be expected to discharge all or part of a deficiency judgment obligation within a reasonable time. This change in the regulation is in keeping with the theme of deterrence underlying HUD's deficiency judgment efforts.

5. Title Defects and Satisfactory Title Evidence

HUD currently requires that, before a final claim for insurance benefits will be approved for payment, the mortgagee must convey good marketable title to the property, accompanied by title evidence satisfactory to the Secretary (24 CFR 203.366). However, HUD estimates that at least six percent of all title evidence documents submitted to HUD field offices contain one or more serious title defects, requiring some form of corrective action. In most instances, the title problems should have been corrected by the mortgagee before conveyance of the property to HUD.

Most of these title defects surface after the final claim has been paid, often hampering HUD's efforts to market and sell properties by causing delays in settlements, cancelled sales, and increased holding costs, as well as extensive administrative costs related to the elimination of the title defects. It has been the Department's experience, moreover, that once the final claim is paid, mortgagees have little incentive to respond to HUD's requests and are slow to take action to correct title defects. Reconveyance, in most instances, presents an inefficient method of remedying the situation, since the mortgagee typically corrects the defect and then conveys the property back to HUD at minimal cost to itself. HUD, on the other hand, reimburses the mortgagee's costs of correcting the title defect and then suffers delays in marketing and disposing of the property.

Under this proposed rule, if a mortgagee does not convey to HUD good marketable title to a property, the mortgagee would have 30 days after notification of the title defect within which to correct the defect. If the defect is not corrected within 30 days, the mortgagee would be charged an amount equal to HUD's estimate of its holding costs, accruing on a daily basis, until either the defect is corrected or, as described below, HUD reconveys the property to the mortgagee. The daily holding costs would be based on HUD's estimates of the taxes, property maintenance, administrative expenses, and lost investment income because of the inability to sell the property until the defect is corrected. Section 203.402(f) would also be amended to provide that no costs borne by the mortgagee for correcting defects in the title would be reimbursed.

If the defect is not corrected within a reasonable time, as determined by the Secretary, HUD would reconvey the property to the mortgagee, and the mortgagee would be required to reimburse HUD for its daily holding costs. The mortgagee would be allowed 90 days from the date of reconveyance to correct the defects, or a longer time as approved by HUD on a case-by-case basis. If the mortgagee does not correct the title defects within the 90 days, or within such longer period as HUD approves, the contract of insurance would be terminated. (This amendment would apply only to mortgages insured under firm commitments issued on or after the effective date of this rule, or by direct endorsement processing where the credit worksheet is signed by the mortgagee's approved underwriter on or after the effective date of this rule.)

This rule would also remove § 203.387, which provides that HUD will consider title and title evidence satisfactory if they are acceptable to prudent lending institutions and leading attorneys generally in the community in which the property is located. HUD believes that the determination of whether title and title evidence are satisfactory is one that should be made by the Secretary rather than delegated to private parties who may have an interest at stake. In making such a determination, the Secretary will consider court decisions and other objective sources. The Secretary may, from time to time, consult with leading lending institutions or title attorneys, but the ultimate determination of whether the title and title evidence are satisfactory and acceptable will be made by the Secretary.

6. Termination of the Insurance Contract

This rule would add § 203.317a to the regulations to provide that the contract of insurance will be cancelled if the mortgagee fails to meet the time limitations imposed by § 203.359(b) (correcting a defective title before conveyance to the Secretary within 90 days after the later of the listed events), § 203.366(b) (correcting a defective title within 90 days after reconveyance by the Secretary) and § 203.379a (repairing damaged property within 90 days after reconveyance by the Secretary). (This rule would apply only to mortgages insured under firm commitments issued on or after the effective date of this rule, or by direct endorsement processing where the credit worksheet is signed by the mortgagee's approved underwriter on or after the effective date of this rule.)

The rule would also amend § 203.283 to provide that termination of the insurance contract under § 203.317a would be an additional condition under which the Secretary would refund a portion of the unearned MIP to the mortgagor where the contract of insurance covering the mortgage is terminated.

7. Noncompliance with Regulations

Section 203.363 currently provides that if a mortgagee fails to comply with any regulations the Secretary may delay processing of its application for insurance benefits for a reasonable time to permit the mortgagee to comply or, alternatively, may reconvey title to the mortgagee. Reconveyance in such a circumstance has the effect of cancelling the application, but without prejudice to the rights of the mortgagee to reapply for insurance benefits at a subsequent date.

This rule would amend § 203.363 to provide that, with regard to mortgages insured under firm commitments issued on or after the effective date of the rule,

or under direct endorsement processing where the credit worksheet was signed by the mortgagee's approved underwriter on or after that date, failure to comply with the regulations would result in delay in processing of the application or, in the alternative, reconveyance. In the event of reconveyance, the mortgagee would be required to refund the insurance benefits to the Secretary, as well as the Secretary's daily costs of holding the property, based on the Secretary's estimate of the taxes, maintenance, administrative expenses, and lost investment income caused by the inability to dispose of the property. (Section 203.364 would also be amended to specify these costs.) The rule would also provide that the mortgagee may reapply for insurance benefits at a subsequent date, unless the contract was terminated under § 203.317a, described above.

The rule would further provide that the mortgagee would not be reimbursed for any expenses incurred in connection with the property nor paid any debenture interest after reconveyance.

8. Review of Claims

The Department has implemented an automated system for the payment of insurance claims. The system is dependent on the accuracy of the information provided by the mortgagee on the claim form. HUD conducts reviews of paid claims to ensure the accuracy and appropriateness of the amounts paid. This rule would amend § 203.365, which describes the documents and information to be submitted to the Secretary by a mortgagee when a claim for insurance benefits is made, to comport with current practice and requirements. The rule would require that a mortgagee maintain a claim file containing supporting documentation of the information for three years after a claim has been paid. The mortgagee would be required to give HUD access to the claim file at any time during the three-year period, or face withdrawal of approved-mortgagee status, debarment, or immediate suspension of all claim payments. The rule would also authorize the Department to use statistical sampling in selecting claims to be reviewed and in determining any overpayments.

Under the amended regulation, mortgagees would no longer be required to forward to the Secretary receipts covering all disbursements or ledger cards covering the mortgage transaction, but would instead retain the receipts and ledger cards, as well as any other information or data pertaining to the mortgage or claim, as a part of the claim file. The mortgagee would still be required to forward, within 45 days after the deed is filed for record, a copy of the deed, title evidence, fiscal data pertaining to the mortgage transaction, and any other information relevant to the claim that the Secretary may require.

Section 203.365 would also be amended to provide that the mortgagee furnish the recording authority with sufficient information so that the original deed can be sent to HUD by the recording authority. The regulations currently require the mortgagee to forward the original deed to HUD as soon as received from the recording authority. HUD is proposing this change to the regulation to reduce the number of parties involved and lessen the likelihood of loss of the original deed.

9. Notice of Transfer of Servicing

Under § 203.502, a mortgagee is authorized to use another individual or firm to service its insured mortgage loans. Whenever servicing is transferred from one mortgagee or servicer to another, the mortgagee effecting the transfer must notify both the mortgagor and HUD. This rule would amend § 203.502(b) to require that the mortgagee or servicer to whom the servicing is transferred notify HUD of the transfer. The regulation also currently requires that HUD be notified within 30 days of the transfer. The form provided mortgagees for this notification (Mortgage Record Change 92080) states the notification time as within 15 days of the transfer. This rule would also amend § 203.502(b) to bring it into compliance with the current practice.

III. Other Matters

This rule would not constitute a "major rule" as that term is defined in section 1(d) of the Executive Order on Federal Regulations issued by President Ronald Reagan on February 17, 1981. An analysis of the rule indicates that it would not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs of prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, room 10276, 451 Seventh Street SW., Washington, DC 20410.

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this rule would not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order. Specifically, the requirements of this rule are directed to lenders and do not impinge upon the relationship between the Federal government and State and local governments. To the extent State and local law is relevant to the requirements of the rule, those laws are followed.

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this rule would not have a significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule governs the actions of mortgagees with respect to insured mortgages in default. Any effect on the family would likely be indirect and insignificant.

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities, because the purpose of the program is to protect lenders from loss by providing insurance on home mortgages.

This rule was listed as item number 1184 in the Department's Semiannual Agenda of Regulations published at 55 FR 44530, 44546 on October 29, 1990, under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects

24 CFR Part 203

Mortgage insurance, Insurance of single family mortgages.

24 CFR Part 234

Condominiums, Mortgage insurance, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, parts 203 and 234 of title 24 of the Code of Federal Regulations are proposed to be amended as follows:

PART 203—MUTUAL MORTGAGE INSURANCE AND REHABILITATION LOANS

1. The authority citation for 24 CFR part 203 would be revised to read as follows:

Authority: Secs. 203, 204 and 211, National Housing Act (12 U.S.C. 1709, 1710, 1715b); sec. 7(d) Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). In addition, Subpart C is also issued under sec. 230, National Housing Act (12 U.S.C. 1715(u)).

2. § 203.283 would be amended by redesignating existing paragraphs (a)(1), (a)(2) and (a)(3) as paragraphs (a)(2), (a)(3) and (a)(4), respectively, and adding a new paragraph (a)(1) to read as follows:

§ 203.283 Refund of one-time MIP.

(a) * * *

(1) By the mortgagee's failure to meet the time limits specified in §§ 203.359(b), 203.366(b) and 203.379a.

* * * * *

3. Section 203.317a would be added, to read as follows:

§ 203.317a Termination for noncompliance with time limitations.

With respect to mortgages insured under firm commitments issued on or after (insert the effective date of this rule), or by direct endorsement processing where the credit worksheet is signed by the mortgagee's approved underwriter on or after (insert the effective date of this rule), failure by mortgagees to meet the time limits specified in §§ 203.359(b), 203.366(b) and 203.379a will result in termination of the contract of insurance. The provisions of § 203.318 do not apply to terminations under this section.

4. Section 203.355 would be revised to read as follows:

§ 203.355 Acquisition of property.

(a) *In general.* Upon default of a mortgage, except as provided in paragraphs (b) through (f), the mortgagee shall take one of the following actions within six months from the date of default, or within any additional time approved by the Secretary or authorized by §§ 203.345, 203.346, or 203.650 through 203.660:

(1) Obtain a deed in lieu of foreclosure (see §§ 203.357, 203.389, and 203.402(f)) with title being taken in the name of the mortgagee or the Secretary; or

(2) Commence foreclosure.

(b) *Vacant or abandoned property.* With respect to defaulted mortgages on vacant or abandoned property, if the mortgagee discovers, or should have discovered, within the first five months after date of default (as provided in paragraph (a) of this section), that is property is vacant or abandoned, the mortgagee must commence foreclosure within 30 days of the date the property is discovered, or should have been discovered, to be vacant or abandoned. The mortgagee need not delay foreclosure on vacant or abandoned property because of the requirements of § 203.606, or because of the notice requirements of §§ 203.650 and 203.651.

(c) *State laws prohibiting foreclosures within six months.* If the laws of the State in which the mortgaged property is located do not permit the commencement of foreclosure within the time limits described in paragraphs (a) and (b) of this section, the mortgagee must commence foreclosure within 30 days after the permissible date under State law.

(d) *Property located on Indian land.* Upon default of a mortgage on property located on Indian land insured pursuant to section 248 of the National Housing Act (see § 203.43h), the mortgagee must comply with §§ 203.350(b) and 203.664.

(e) *Property located on Hawaiian home lands.* Upon default of a mortgage on property located on Hawaiian home lands insured pursuant to section 247 of the National Housing Act (see § 203.43i), the mortgagee must comply with §§ 203.350(c) and 203.665.

(f) *Property located on the Allegany Reservation of the Seneca Nation of Indians.* Upon default of a mortgage on property located on the Allegany Reservation of the Seneca Nation of Indians authorized by section 203(q) of the National Housing Act (see § 203.43j), the mortgagee must comply with §§ 203.350(d) and 203.666, unless the mortgagor and the lessor have executed a lease renewal or a new lease either with a term of not less than five years beyond the maturity date of the mortgage, or with a term established by arbitriation award. If a lease renewal or new lease has been executed, the mortgagee must comply with paragraph (a) of this section.

5. Section 203.356 would be revised to read as follows:

§ 203.356 Notice of foreclosure; reasonable diligence requirement.

The mortgagee must give written notice to the Secretary within 30 days after the institution of foreclosure proceedings, and must exercise reasonable diligence in prosecuting the foreclosure proceedings to completion and in acquiring title to and possession of the property. A time frame that is determined by the Secretary to constitute "reasonable diligence" for each State is made available to mortgagees.

6. Section 203.359 would be revised to read as follows:

§ 203.359 Time of conveyance to the Secretary.

(a) *Time of conveyance.* The mortgagee must acquire good marketable title and transfer the property to the Secretary within 30 days of the later of:

(1) Filing for record the foreclosure deed;

(2) Recording date of deed in lieu of foreclosure;

(3) Acquiring possession of the property; or

(4) Expiration of the redemption period.

(b) Time of conveyance after correcting title defect. If the mortgagee cannot meet the 30-day requirement, in accordance with paragraph (a) of this section, because of the necessity to correct a title defect, the mortgagee must correct the defect and transfer the property to the Secretary within 90 days of the later or the events listed in paragraph (a), or such longer period as the Secretary may approve, or the contract of insurance shall terminate in accordance with § 203.317a.

7. Section 203.363 would be revised to read as follows:

§ 203.363 Effect of noncompliance with regulations.

(a) *For mortgages insured under firm commitments issued prior to (insert effective date of rule) or under direct endorsement processing where the credit worksheet was signed by the mortgagee's approved underwriter prior to (insert effective date of rule).* If, for any reason, the mortgagee fails to comply with the regulations in this subpart, the Secretary may hold processing of the application for insurance benefits in abeyance for a reasonable time in order to permit the mortgagee to comply, or, in the alternative, the Secretary may reconvey title to the property to the mortgagee, in which event the application for insurance benefits shall be considered as canceled without prejudice to the rights of the mortgagee to reapply for insurance benefits at a subsequent date.

(b) For mortgages insured under firm commitments issued on or after (insert effective date of rule), or under direct endorsement processing where the credit worksheet was signed by the mortgagee's approved underwriter on or after (insert effective date of rule). If, for

any reason, the mortgagee fails to comply with the regulations in this subpart, the Secretary may hold processing of the application for insurance benefits in abeyance for a reasonable time in order to permit the mortgagee to comply. In the alternative to holding processing in abeyance, the Secretary may reconvey title to the property to the mortgagee, in which event the application for insurance benefits shall be considered as cancelled and the mortgagee shall refund the insurance benefits to the Secretary as well as other funds required by § 203.364. The mortgagee may reapply for insurance benefits at a subsequent date, unless the insurance contract has been terminated in accordance with § 203.317a; provided, however, that the mortgagee will not be reimbursed for any expenses incurred in connection with the property after it has been reconveyed by the Secretary, or paid any debenture interest after the reconveyance of the property by the Secretary.

8. Section 203.364 would be revised, to read as follows:

§ 203.364 Mortgagee's liability for property expenditures.

Where the Secretary acquires a property and thereafter it becomes necessary for the Secretary to reconvey the property to the mortgagee due to the mortgagee's noncompliance with these regulations or the application for insurance benefits is withdrawn with the consent of the Secretary, the mortgagee shall reimburse the Secretary for all expenses incurred in connection with such acquisition and reconveyance. The reimbursement shall include the Secretary's cost of holding the property, accruing on a daily basis, from the date the deed to the Secretary was filed for record to the date of reconveyance. These costs are based on the Secretary's estimate of the taxes, maintenance of the property, administrative expenses and lost investment income caused by the Secretary's inability to sell the property. Appropriate adjustments shall be made by the Secretary on account of any income received from the property.

9. Section 203.365 would be revised, to read as follows:

§ 203.365 Documents and information to be furnished the Secretary; claims review.

(a) *Items to be furnished the Secretary.* Within 45 days after the deed is filed for record, the mortgagee must forward to the Secretary:

(1) A copy of the deed to the Secretary that has been filed for record and the title evidence continued so as to include recordation of the deed.

(2) Fiscal data pertaining to the mortgage transaction.

(3) Any additional information or data that the Secretary may require.

(b) *Original deed.* The mortgagee must provide the recording authority with sufficient information so that the original deed will be sent to HUD by the recording authority.

(c) *Items to be retained by mortgagee.* The mortgagee must retain all cash amounts, held or deposited for the account of the mortgagor or to which it is entitled under the mortgage transaction, that have not been applied in reduction of the principal mortgage indebtedness.

(d) *Claim file to be maintained by mortgagee.* (1) The Secretary may verify the accuracy of information regarding the insurance claim either before payment of the claim or after payment by periodic reviews of the mortgagee's records. Mortgagees must reimburse the Secretary for any claim and interest overpaid because of incorrect, unsupported, or inappropriate information provided by the mortgagee.

(2) Mortgagees must maintain a claim file containing documentation supporting all information submitted for claim payment for three years after a claim has been paid. Information to be maintained in the claim file includes receipts covering all disbursements as required by the fiscal data form, ledger cards covering the mortgage transaction, and any additional information or data relevant to the mortgage transaction or insurance claim.

(3) The Secretary may review any claim file at any time during the three-year period after the claim has been paid. Denial of access to any files will be grounds for withdrawal of the mortgagee's approved lender status, debarment by the Secretary, or immediate suspension of all claim payments.

(4) Within 24 hours of a request by the Secretary, a mortgagee must make available for review, or forward to the Secretary, hard copies of identified claim files.

(e) *Statistical sampling.* HUD may use statistical sampling in selecting claims to be reviewed and in determining the amount due the Secretary because of overpayment.

10. Section 203.366 would be amended by designating the existing text as paragraph (a) and adding a new paragraph heading, and by adding a new paragraph (b), to read as follows:

§ 203.366 Conveyance of marketable title.

(a) *Satisfactory conveyance of title and transfer of possession.* * * *

(b) *Conveyance of property without good marketable title.* (1) For mortgages insured under firm commitments issued on or after *(insert effective date),* or under direct endorsement processing where the credit worksheet was signed by the mortgagee's approved underwriter on or after *(insert effective date),* if the title to the property conveyed by the mortgagee to the Secretary is not good and marketable, the mortgagee must correct any defect within 30 days after receiving notice from the Secretary. If the defect is not corrected within 30 days, the mortgagee must reimburse the Secretary after such 30-day period for HUD's costs of holding the property, accruing on a daily basis, until the defect is corrected or until the Secretary reconveys the property to the mortgagee, as described in paragraph (b)(2) of this section. The daily holding costs to be charged a mortgagee shall include the costs specified in § 203.364.

(2) If the title defect is not corrected within a reasonable time, as determined by HUD, the Secretary will, after notice, reconvey the property to the mortgagee and the mortgagee must reimburse the Secretary in accordance with §§ 203.363 and 203.364. The mortgagee may correct the defect and reapply for insurance benefits within 90 days of the date the Secretary reconveyed the property, or such longer period as the Secretary may approve.

(3) If the mortgagee does not correct the title defect and reapply for insurance benefits within 90 days, or such longer period as the Secretary may approve, the contract of insurance shall terminate in accordance with § 203.317a.

11. In § 203.369, paragraphs (a) and (b) would be revised, to read as follows:

§ 203.369 Deficiency judgments.

(a) *Mortgages insured on or after March 28, 1988.* (1) For mortgages insured pursuant to firm commitments issued on or after March 28, 1988, or pursuant to direct endorsement processing under §§ 200.163–200.164a of this chapter where the credit worksheet was signed by the mortgagee's approved underwriter on or after March 28, 1988, the Secretary may require the mortgagee diligently to pursue a deficiency judgment in connection with any foreclosure. With respect to claims filed for insurance benefits on such mortgages, any judgment obtained by the mortgagee must be assigned to the Secretary.

(2) In cases where the Secretary required the pursuit of a deficiency judgment and provides the mortgagee with the Secretary's estimate of the fair market value of the property, less

adjustments, in accordance with § 203.368(e), the mortgagee must tender a bid at the foreclosure sale in that amount, and must take all other appropriate steps in accordance with State law to obtain a deficiency judgment.

(b) *Mortgages insured before March 28, 1988.* For mortgages insured pursuant to firm commitments issued before March 28, 1988, or pursuant to direct endorsement processing under §§ 200.163–200–164a of this chapter where the credit worksheet was signed by the mortgagee's approved underwriter before March 28, 1988, the Secretary may request that the mortgagee diligently pursue a deficiency judgment in connection with the foreclosure. With respect to claims filed for insurance benefits on such mortgages, any judgment obtained by the mortgagee must be assigned to the Secretary.

* * * * *

12. Section 203.377 would be amended by adding a sentence at the end of the section, to read as follows:

§ 203.377 Inspection and preservation of properties.

* * * "Reasonable action" includes the commencement of foreclosure within 30 days of discovery of the property's being vacant or abandoned, as required by § 203.355(b).

13. Section 203.378 would be amended by adding a paragraph heading to paragraph (a), revising paragraph (b) and adding new paragraphs (c), (d), and (e), to read as follows:

§ 203.378 Property condition.

(a) *Condition at time of transfer.* * * *

(b) *Damage to property by waste.* The mortgagee shall not be liable for damage to the property by waste committed by the mortgagor, its heirs, successors or assigns in connection with mortgage insurance claims paid on or after July 2, 1968.

(c) *Damage to vacant or abandoned property.* The mortgagee shall be responsible for damage to or destruction of security properties on which the loans are in default and which properties are vacant or abandoned, when such damage or destruction is due to the mortgagee's failure to take reasonable action to inspect, protect and preserve such properties as required by §203.377, as to all mortgages insured on or after January 1, 1977.

(d) *Damage to property insured by mortgages under firm commitments issued on or after (insert effective date of the rule), or under direct endorsement processing where the credit worksheet was signed by the mortgagee's approved underwriter on or after (insert effective date of rule).* The mortgagee shall be responsible for any damage of whatsoever nature that the property has sustained while in the possession of the mortgagee.

(e) *Limitation.* The mortgagee's responsibility for property damage shall not exceed the amount of its insurance claim as to a particular property.

14. Section 203.379 would be amended by revising the section heading and by adding the following text to the beginning of the introductory paragraph, to read as follows:

§ 203.379 Adjustment for damage or neglect for mortgages insured prior to (insert effective date of rule).

For mortgages insured under firm commitments issued prior to [insert effective date of rule] or under direct endorsement processing where the credit worksheet was signed by the mortgagee's approved underwriter prior to [insert effective date of rule], * * *

* * * * *

15. Section 203.379a would be added, to read as follows:

§ 203.379a Adjustment for damage or neglect for mortgages insured after (insert effective date of rule).

(a) *Applicability.* This section applies to mortgages insured under firm commitments issued on or after (insert effective date of this rule), or under direct endorsement processing where the credit worksheet was signed by the mortgagee's approved underwriter on or after (insert effective date of this rule).

(b) *Repair of damage.* If the property has been damaged by fire, flood, earthquake or tornado or if the property has suffered damage of any nature while in the possession of the mortgagee, the mortgagee must repair the damage before conveyance of the property or assignment of the mortgage to the Secretary unless the Secretary determines that it is in the best interest of the Department to accept conveyance in a damaged condition. A property shall be considered to be in the possession of the mortgagee on the date on which it was first discovered to be vacant by the mortgagee or the date on which it should have been discovered to be vacant by the mortgagee, making inspections as required by §203.377.

(c) *Damaged property conveyed with HUD approval.* Under circumstances where it is determined to be in the best interest of HUD, the Secretary may give approval for the mortgagee to convey the property in a damaged condition. If the Secretary approves the conveyance of the property in a damaged condition, the estimated cost of repairing the damage or any insurance recovery received by the mortgagee, whichever is greater, would be deducted from the insurance claim, plus an additional charge for administrative costs incurred by HUD in connection with the damaged property.

(d) *Damaged property conveyed without Secretary approval.* (1) In the event that damaged property is conveyed to the Secretary without prior approval, the Secretary has the option to agree to accept such property in a damaged condition. In such event, mortgagees will be notified in writing by the Secretary of his or her intention to reduce the claim by either the estimated cost of repairing the property or the insurance recovery, whichever is greater, plus an additional charge for administrative costs incurred by HUD in connection with the damaged property.

(2) In the alternative, the Secretary may refuse to accept the property in a damaged condition and will reconvey the property to the mortgagee in accordance with §§203.363 and 203.364 so that the mortgagee can fully repair the property. The mortgagee may also elect to request reconveyance of the property to repair it rather than allowing its claim to be reduced for the property damage. If the property is reconveyed to the mortgagee to be repaired, the mortgagee must repair the property and reconvey it to the Secretary within 90 days from the date of the Secretary's reconveyance to the mortgagee, or such additional time as approved by the Secretary. If the mortgagee, fails to repair the property and reconvey it to the Secretary within 90 days, or such longer time as approved by the Secretary, the insurance contract would be terminated in accordance with §203.317a.

§ 203.387 [Removed]

16. Section 203.387 would be removed.

§ 203.391 [Removed]

17. Section 203.391 would be removed.

18. Section 203.402 would be amended by revising the first sentence in paragraph (f) revising (k) (1), and adding paragraph (p), to read as follows:

§ 203.402 Items included in payment—conveyed and non-conveyed properties.

* * * * *

(f) Foreclosure costs or costs of acquiring the property otherwise (including costs of acquiring the property by the mortgagee and of conveying and evidencing title to the property to the Secretary, but not including any costs borne by the

mortgagee to correct title defects) actually paid by the mortgagee and approved by the Secretary, in an amount not in excess of two-thirds of such costs or $75, whichever is the greater. * * *

* * * * *

(k) (1) For properties conveyed to the Secretary, an amount equivalent to the debenture interest which would have been earned, as of the date such payment is made, on the portion of the insurance benefits paid in cash, if such portion had been paid in debentures, except that when the mortgagee fails to meet any one of the applicable requirements of §§203.355, 203.356, 203.359, 203.360, 203.365, 203.366 and 203.379a of this chapter within the specified time and in a manner satisfactory to the Commissioner (or within such further time as the Commissioner may approve in writing), the interest allowance in such cash payment shall be computed only to the date on which the particular required action should have been taken or to which it was extended.

* * * * *

(p) Notwithstanding any other provision in this section, the mortgagee will not be reimbursed for any expenses incurred in connection with the property after a reconveyance from the Secretary to the mortgagee as provided in §203.363.

19. Section 203.502 would be amended by adding a sentence to the end of paragraph (b), to read as follows:

§ 203.502 Responsibility for servicing.

* * * * *

(b) * * * The mortgagee or servicer to whom the servicing is transferred shall notify the Secretary within fifteen days of the transfer, on a form approved by the Secretary.

20. Section 203.606 would be amended by revising paragraph (b) (1), to read as follows:

§ 203.606 Pre-foreclosure review.

* * * * *

(b) * * *

(1) The mortgaged property has been abandoned, or has been vacant for more than 30 days.

* * * * *

PART 234—CONDOMINIUM OWNERSHIP MORTGAGE INSURANCE

21. The authority citation for 24 CFR Part 234 would be revised to read as follows:

Authority: Secs. 211, 234, National Housing Act (12 U.S.C. 1715b, 1715y); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

22. Section 234.255 would be amended by adding to the list of excepted provisions in paragraph (a) another section, to read as follows:

§ 234.255 Cross-reference.

(a) * * *

203.379a Adjustment for damage or neglect for mortgages insured prior to (insert effective date of rule.).

* * * * *

Dated: February 6, 1991.

Arthur J. Hill,

Acting Assistant Secretary for Housing-Federal Housing Commissioner.

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Part IV

Department of Health and Human Services

Food and Drug Administration

21 CFR Parts 201 and 331

Drug Labeling; Sodium Labeling for Over-the-Counter Drugs; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 201 and 331

[Docket No. 90N-0309]

Drug Labeling; Sodium Labeling for Over-the-Counter Drugs; Proposed Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the general labeling provisions for over-the-counter (OTC) drug products to: (1) Require that the sodium content of all orally administered OTC drug products be included in labeling when the product contains 5 milligrams (mg) or more sodium per a single recommended dose, (2) require that orally administered OTC drug products containing more than 140 mg sodium in the maximum recommended daily dose be labeled with a general warning that persons who are on a sodium-restricted diet should not take the product unless directed by a doctor, and (3) provide for the voluntary use of certain descriptive terms relating to the product's sodium content. FDA is issuing this notice of proposed rulemaking in order to provide uniform sodium content labeling for all orally administered OTC drug products, and to provide for the voluntary use in OTC drug labeling of the same terms used to describe sodium content in food labeling.

DATES: Written comments by June 24, 1991. Written comments on the agency's economic impact determination by June 24, 1991.

ADDRESSES: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Room 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: William E. Gilbertson, Center for Drug Evaluation and Research (HFD-210), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8000.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of April 18, 1984 (49 FR 15510), FDA published a final rule on the declaration of sodium content of foods and label claims for foods and the basis of sodium content. The final rule established 21 CFR 101.13, which provides, in part, for the use of the following descriptive terms relating to the quantitative sodium content of foods: (1) The term "sodium free" may be used on the label and in the labeling of foods that contain less than 5 mg of sodium per serving, (2) the term "very low sodium" may be used on the label and in the labeling of foods that contain 35 mg or less of sodium per serving, and (3) the term "low sodium" may be used on the label and in the labeling of foods that contain 140 mg or less of sodium per serving.

In the **Federal Register** of July 19, 1990, the agency published food labeling proposed rules on (1) reference daily intakes and daily reference values (55 FR 29476); mandatory status of nutrition labeling and nutrient content revision (55 FR 29487); and serving sizes (55 FR 29517). In these rulemakings, the agency's proposals included (1) the establishment of daily reference values (DRV's) for certain food components, including sodium (55 FR 29476 at 29483), that are important to the maintenance of good health, (2) a statement that the declaration of sodium content expressed in milligrams should remain mandatory (55 FR 29487 at 29500), and (3) an amendment to the nutritional labeling regulations to define portion size on the basis of the amount of food commonly consumed per eating occasion (55 FR 29517 at 29522).

Consumers are increasingly aware of the possible adverse health effects of sodium, but they cannot adhere to sodium-restricted diets if they do not know the sodium content of the food and other substances, such as drugs, that they ingest. The agency believes that the sodium content labeling used for foods should be extended to all orally administered OTC drug products because (1) many people are on sodium-restricted diets, (2) sodium-containing OTC drugs could, for some individuals, contribute a significant percentage of the daily intake for sodium, and (3) there is a widespread interest by consumers in reducing their sodium intake (Ref. 1).

The agency has reviewd the existing OTC drug regulations and the ongoing OTC drug rulemaking to (1) consolidate and develop uniform requirements relating to the labeling of sodium content of orally administered OTC drug products and (2) require an appropriate warning to ensure the safe use of OTC drug products that contain certain amounts of sodium in the recommended daily dose.

The existing requirement for OTC antacid drug products in § 331.30(f) (21 CFR 331.30(f)) provides that the "labeling of the product contains the sodium content per dosage unit (e.g., tablet, teaspoonful) if it is 0.2 milliequivalents (mEq) (5 mg) or higher." Section 331.30(c)(5) requires the following warning for any OTC antacid drug product that contains more than 5 mEq (115 mg) sodium in the maximum recommended daily dose: "Do not use this product except under the advice and supervision of a physician if you are on a sodium restricted diet." These requirements have been in effect since 1974, and affected OTC antacid drug products are labeled accordingly.

In the **Federal Register** of March 21, 1975 (40 FR 12902), the agency published the recommendations of the Advisory Review Panel on OTC Laxative, Antidiarrheal, Emetic, and Antiemetic Drug Products. That notice contained the Panel's recommended monographs on four drug categories—laxatives (part 334), antidiarrheals (part 335), antiemetics (part 336), and emetics (part 337). Two of those recommended monographs contained labeling requirements relating to sodium content. The Panel's recommended monographs for laxatives and antidiarrheals both required that products containing more than 15 mEq (345 mg) of sodium in the maximum recommended daily dose bear the following warnings: "Do not use this product except under the advice and supervision of a physician if you are on a low salt diet" and "Do not use this product except under the advice and supervision of a physician if you have kidney disease." In addition, both recommended monographs required a quantitative statement of sodium content per dosage unit for products containing more than 1 mEq (23 mg) of sodium per maximum daily dose.

In the **Federal Register** of January 15, 1985 (50 FR 2124), FDA published the tentative final monograph for OTC laxative drug products and revised the Panel's recommendations. The agency stated that the Panel's recommended warnings for sodium-containing laxatives were not consistent with the sodium warning required for OTC antacid drug products (21 CFR 331.30(c)(5)). (See 50 FR 2148.) To resolve this inconsistency, the agency proposed that the Panel's recommended kidney disease warning be deleted and that the sodium-restricted diet warning apply to all laxative products containing more than 5 mEq (115 mg) of sodium in the maximum recommended daily dose. The tentative final monograph for OTC laxative drug products thus provides in proposed § 334.50(b)(5) (21 CFR 334.50(b)(5)) for products containing more than 5 mEq (115 mg) of sodium in the maximum recommended daily dose: "Do not use this product if you are on a low salt diet unless directed by a doctor."

Proposed § 334.50(b)(8) of the tentative final monograph provides that any laxative drug product "containing more than 1 milliequivalent (23 milligrams) sodium per maximum daily dose shall be labeled as to the sodium content per dosage unit." This requirement was inconsistent with the final monograph for OTC antacid drug products, which required quantitative sodium-content labeling for products containing 5 mg or more per dosage unit. However, the agency proposed to retain the Panel's recommendation to require a statement of sodium content per dosage unit for all OTC laxative drug products containing more than 1 mEq (23 mg) of sodium per maximum daily dose because it would be more informative (50 FR 2148). The agency received two comments relating to sodium labeling in response to the tentative final monograph. The comments contended that the sodium labeling of OTC laxative and other drug products should be consistent with FDA's food labeling terminology. They stated that food products already bear FDA terminology and the food terminology will become the dominant system. Thus, other mandatory FDA labeling systems should be made consistent with that system. The agency is taking this approach in this current proposal for OTC drug products containing sodium.

The tentative final monograph for OTC antidiarrheal drug products (April 30, 1986; 51 FR 16138) did not include any Category I sodium-containing ingredients, and therefore did not include any recommendation for sodium labeling. Because final monographs for OTC laxative and antidiarrheal drug products have not yet been published, no OTC laxative or antidiarrheal drug product is currently required to meet these labeling requirements. Consequently, any revisions in the requirements previously proposed for these products would not adversely affect currently marketed OTC laxative and antidiarrheal drug products.

In the Federal Register of July 8, 1977 (42 FR 35345), the agency published the recommendations of the Advisory Review Panel on OTC Internal Analgesic, Antipyretic, and Antirheumatic Drug Products. Section 343.50(c)(8)(i) of the Panel's recommended monograph for OTC internal analgesic, antipyretic, and antirheumatic drug products contains the same quantitative labeling requirement for sodium content that appears in § 331.30(f) of the final monograph for OTC antacid drug products. Antacid products containing 0.2 mEq (5 mg) or higher of sodium per dosage unit are required to contain in their labeling the sodium content per dosage unit. In addition, in § 343.50(c)(8)(ii) the Panel's recommended monograph contains a warning alerting persons on a sodium-restricted diet not to consume internal analgesic-antipyretic products containing more than 5 mEq (125 mg) of sodium in the maximum recommended daily dose except under the advice and supervision of a physician. The sodium warning requirement recommended by the Panel incorrectly equated 5 mEq to 125 mg of sodium rather than 115 mg. (One mEq of sodium is 23 mg; 5 mEq is therefore equivalent to 115 mg of sodium.)

No comments relating to the sodium warning or to sodium content labeling were received in response to the advance notice of proposed rulemaking. In the Federal Register of November 16, 1988 (53 FR 46024), FDA published the tentative final monograph for OTC internal analgesic, antipyretic, and antirheumatic drug products and included recommendations relating to sodium labeling similar to those recommended by the Panel. For those products containing 0.2 mEq (5 mg) or higher of sodium per dosage unit, the proposed labeling of the product contains the sodium content per dosage unit (e.g., tablet, teaspoonful). For those products containing more than 5 mEq (125 mg) of sodium in the maximum recommended daily dose, the proposed warning is as follows: "Do not take this product if you are on a sodium restricted diet unless directed by a doctor." (See 53 FR 46204 at 46256.) In response to one comment's request that professional labeling include the use of buffered aspirin for transient ischemic attacks, the agency excluded sodium-containing buffered aspirin because the chronic ingestion of sodium was thought to be ill-advised in such patients (see 53 FR 46024 at 46229). In response to a similar request for professional labeling of aspirin for myocardial infarction, the agency included the proposal along with a statement that the amount of sodium contained in buffered aspirin may not be tolerated by patients with active sodium-retaining states such as congestive heart or renal failure (see 53 FR 46204 at 46232).

The agency did not receive comments relating to sodium labeling in response to the tentative final monograph. However, OTC internal analgesic-antipyretic drug products currently marketed are not required to meet the proposed labeling requirements until a final monograph is published. Thus, any revisions to the previously proposed labeling would not adversely affect currently marketed drug products.

Reference

(1) Levy, A. S. and J. T. Heimbach, Division of Consumer Studies (HFF-240), Center for Food Safety and Applied Nutrition, Food and Drug Administration, "Recent Public Education Efforts About Health and Diet in the United States," Washington, DC 1989.

The Agency's Tentative Conclusions on Sodium Labeling for OTC Drug Products

FDA believes that the public interest in and the public health consequences of sodium intake have produced a need for more informative and consistent sodium content labeling information on drugs and foods. This is particularly true for individuals with hypertension or heart failure, who must monitor their sodium intake. The agency has considered a number of items in developing this proposal: (1) The existing labeling requirements for OTC antacid drug products, (2) the proposed sodium labeling requirements for OTC laxative and internal analgesic-antipyretic drug products, (3) the Panel's recommendations for OTC antidiarrheal drug products, (4) the final rule on sodium labeling for food products, and (5) other recent agency proposals on food labeling. Each rulemaking adequately conveys the necessary information, but a more uniform approach would be better understood and less confusing to consumers.

In order to establish uniform content declarations, warnings, and descriptive terms relating to sodium in foods and orally administered OTC drugs, the agency is proposing to adopt: (1) 5 mg or more as the amount of sodium per a single recommended dose of the product (which may involve one or more dosage units, e.g., tablets, teaspoonsful, etc.) that requires a sodium content declaration, (2) 140 mg (about 6 mEq) as the amount of sodium present in the maximum recommended daily dose for an orally administered OTC drug product above which a sodium warning is required, and (3) voluntary use of the following descriptive terms: "Sodium-free" for those OTC drug products containing less than 5 mg in the maximum recommended daily dose; "very low sodium" for those containing 35 mg or less; and "low sodium" for those containing 140 mg or less. These proposals should help provide uniformity in the sodium labeling of food and OTC drug products. The agency is therefore proposing to amend the general drug labeling provisions in 21 CFR part 201 to include the following provisions for OTC orally administered drug products: (1) A quantitative

labeling requirement for sodium content, (2) a warning for persons on sodium-restricted diets, and (3) the voluntary use of descriptive terms relating to quantitative sodium content.

Because consumers and health professionals are accustomed to computing sodium intake in mg (49 FR 15510 at 15530), and for uniformity in the declaration of sodium content labeling for foods and orally administered OTC drug products, the term "milligrams" or the abbreviation "mg" should be used to designate the sodium content of OTC drug products. To simplify OTC drug labeling and to make it more readable for consumers, the sodium content, in mg, should be rounded off to the nearest whole number when the dosage unit contains less than 5 mg of sodium, to the nearest 5 mg increment (5, 10, 15, etc.) when the dosage unit contains 5 to 140 mg, and to the nearest 10 mg increment (140, 150, etc.) when the dosage unit contains greater than 140 mg. Furthermore, the declaration of sodium content should include the total sodium in a dosage unit of the drug product, i.e., sodium from active and inactive ingredients.

The existing quantitative sodium labeling requirement for OTC antacid drug products is based on the sodium content per dosage unit. The existing regulation (21 CFR 331.30(f)) states that the labeling of the product contains the sodium content per dosage unit (e.g., tablet, teaspoonful) if it is "0.2 mEq. (5 mg) or higher." However, a single dose of an antacid product may consist of more than one dosage unit (e.g., 2 tablets per dose). Although a single dosage unit (e.g., one tablet, teaspoonful) may contain less than 5 mg sodium, a single dose of the drug may contain 5 mg or more of sodium. The agency believes that the existing quantitative sodium labeling requirement should be changed to state that the product's labeling shall contain the sodium labeling per dosage unit (e.g., tablet, teaspoonful) if the sodium content of a single recommended dose of the product (which may involve one or more dosage units) is 5 mg or more. Therefore, the agency is proposing in this notice that if the single recommended dose (one or more dosage units) of the product contains 5 mg or more of sodium, a declaration of sodium content expressed in mg per single dosage unit (e.g., tablet, teaspoonful) is required. This declaration of sodium content should be rounded off appropriately, as discussed above.

As an illustration, if a single dosage unit of a product contained 3.8 mg of sodium and the recommended dose of the product was one dosage unit, the product would not have to bear sodium content labeling. If the recommended dose of the same product was two dosage units, the product would need to bear sodium content labeling per dosage unit, and the amount would be rounded off to 4 mg (the nearest whole number). If the recommended dose of the product was one or two dosage units, the product would have to bear sodium content labeling because the consumer would have the option to take a two-dosage-unit dose. If a single dosage unit of the product contained 7.6 mg of sodium, the labeling would be rounded off to 10 mg (the nearest 5 mg increment). If a single dosage unit of the product contained 146 mg, it would be rounded off to 150 mg (the nearest 10 mg increment).

A warning would also be required on OTC drug products containing more than 140 mg sodium in the maximum recommended daily dose to alert persons who are on a sodium-restricted diet. The agency is proposing in this document that the sodium warning currently required by the final monograph for OTC antacid drug products ("Do not use this product except under the advice and supervision of a physician if you are on a sodium restricted diet") be revised slightly to reflect the current format and style of recently published OTC drug tentative final and final monographs. The revised warning would read: "Do not use this product if you are on a sodium restricted diet unless directed by a" (select one of the following "physician" or "doctor").

This proposed rule would also allow the use, in certain cases, of the descriptive terms "sodium free," "very low sodium," or "low sodium." These descriptive terms for OTC drug products are the same as those discussed above for foods having the corresponding sodium content in one serving. The agency believes that consumers are already familiar with the terms as used in food labeling. However, the sodium content of food per serving cannot reasonably be equated to the sodium content of a drug dosage unit. A dose of a drug may consist of multiple dosage units, and the maximum dose per day could involve multiple doses. The agency is therefore proposing for any orally administered OTC drug product containing sodium that the basis for determining which descriptor ("sodium free," "very low sodium," or "low sodium") should be used is the amount of sodium contained in the maximum recommended daily dose.

The proposed warning in the tentative final monograph for OTC laxative drug products used the term "salt" rather than the term "sodium" as used in § 331.30(c)(5) of the final monograph for OTC antacid drug products. In discussing diet, the term "salt" generally refers to sodium chloride, which is the commonly used table "salt." However, the term salt is not synonymous with sodium because some compounds that are salts do not contain sodium. Sodium chloride is a primary source of dietary sodium consumption, but there are other sources of dietary sodium such as sodium bicarbonate (baking soda) and monosodium glutamate (MSG). Similarly, drugs may also contain sodium in the form of sodium chloride, sodium bicarbonate, or other sodium ingredients. The term "salt" in the warning proposed in the tentative final monograph for OTC laxative drug products does not specifically refer to sodium. The agency believes that the warning referring to "sodium" in the final monograph for OTC antacid drug products is more appropriate. The agency has included in this proposed rule a provision that the term "salt" should not be used interchangeably or substituted for the term "sodium."

In an effort to simplify OTC drug labeling, the agency proposed in a number of tentative final monographs to substitute the word "doctor" for "physician" in OTC drug monographs on the basis that the word "doctor" is more commonly used and better understood by consumers. Based on comments received to these proposals, the agency has determined that final monographs and any applicable OTC drug regulations will give manufacturers the option of using either the word "physician" or the word "doctor." This proposed rule includes that option.

The agency encourages manufacturers to comply voluntarily with the provisions of this proposed rule despite the fact that revisions in the requirements may occur in the final rule in response to submitted comments. Should any manufacturer choose to adopt the labeling described in this proposed rule, and should any revisions occur in the final rule, the agency will permit the use of existing stocks of labels for those products labeled according to the proposed rule for a period of 1 year following publication of the final rule.

Should this proposed amendment to part 201 relating to the sodium labeling of all OTC orally administered drug products be published as a final rule, then the existing requirements relating to sodium labeling in § 331.30 (c)(5) and (f) of the final monograph for OTC antacid drug products and the proposed

sodium labeling requirements being considered in other ongoing OTC drug rulemaking will be deleted.

The agency has examined the economic consequences of this proposed rulemaking and has determined that it does not require either a regulatory impact analysis, as specified in Executive Order 12291, or a regulatory flexibility analysis, as defined in the Regulatory Flexibility Act (Pub. L. 96–354).

Should this proposed rule become a final rule, one-time label modification costs associated with changing product labels would be incurred by some manufacturers. FDA estimates those costs to total less than $500,000 for the entire industry. This projected cost is based on estimates of the number of products that will be affected by the proposed rule, the number of distinct label changes that will be required, and the cost of printing new labels.

OTC antacid drug products are the primary products having a significant number of orally administered active ingredients containing sodium. The monograph for those products has been in effect since 1974 and these products currently bear sodium labeling. For these products, the labeling change would involve a slight change in wording, resulting only in a minor cost to have a labeling revision printed. In almost all cases, this revision would be routinely done at the next labeling printing so that minimal costs should be incurred. Manufacturers will have up to 12 months after publication of a final rule in the **Federal Register** to revise their product labeling. It is anticipated that most antacid drug products would undergo a label printing within a 12-month period. Because these products already bear sodium labeling warnings, the agency would be willing to extend the time period beyond 12 months, if necessary, upon request, for the revised wording to be implemented.

Other OTC drug products (i.e., laxatives and internal analgesics) having a few sodium-containing active ingredients that would be affected by mandatory sodium labeling currently are not required to bear sodium labeling. These products would need to have new labels printed to incorporate the sodium labeling. These products will also need to have new labeling printed in the future when the final monographs for OTC laxative and internal analgesic drug products are published. This again involves one-time label modification costs. For products that will be undergoing such labeling changes, the incremental costs attributable to this rule for sodium labeling would be negligible. A limited number of OTC laxative and internal analgesic drug products contain sodium-containing active ingredients. Tentative final monographs have been published that proposed sodium labeling requirements for these products, and no adverse economic comments have been received in response to the proposals.

The agency is not aware of any significant number of other OTC drug products that would be affected due to the sodium content of inactive ingredients. The use of the sodium descriptive terms proposed in this rulemaking is voluntary. Therefore, any implementation of these terms could be done by a manufacturer at any time that new labeling is ordered. The agency finds that the cost of adding one of these descriptive terms to the product's labeling would be negligible.

Therefore, the agency concludes that the economic impact of this proposed rule, if implemented, would be minimal and that the proposed rule is not a major rule as defined in Executive Order 12291. Further, the agency certifies that the proposed rule, if implemented, will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act.

The agency invites public comment regarding any substantial or significant economic impact that this rulemaking would have on orally administered OTC drug products. Types of impact may include, but are not limited to, costs associated with relabeling, repackaging, or reformulating. Comments regarding the impact of this rulemaking on orally administered OTC drug products should be accompanied by appropriate documentation. A period of 60 days from the date of publication of this proposed rulemaking in the **Federal Register** will be provided for comments on this subject to be developed and submitted. The agency will evaluate any comments and supporting data that are received and will reassess the economic impact of this rulemaking in the preamble to the final rule.

The agency has determined under 21 CFR 25.24(c)(6) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Interested persons may, on or before June 24, 1991, submit to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, written comments, objections, or requests for oral hearing before the Commissioner on the proposed amendment. A request for an oral hearing must specify points to be covered and time requested. Written comments on the agency's economic impact determination may be submitted on or before June 24, 1991. Three copies of all comments, objections, and requests are to be submitted, except that individuals may submit one copy. Comments, objections, and requests are to be identified with the docket number found in brackets in the heading of this document and may be accompanied by a supporting memorandum or brief. Comments, objections, and requests may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. Any scheduled oral hearing will be announced in the **Federal Register**.

List of Subjects

21 CFR Part 201

Drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 331

Antacid drug products, Labeling, Over-the-counter drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act, it is proposed that subchapter C and D of chapter I of title 21 of the Code of Federal Regulations be amended in parts 201 and 331, respectively, as follows:

PART 201—LABELING

1. The authority citation for 21 CFR part 201 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 505, 506, 507, 508, 510, 512, 701, 704, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 357, 358, 360, 360b, 371, 374, 376); secs. 215, 301, 351, 354–360F, 361 of the Public Health Service Act (42 U.S.C. 216, 241, 262, 263b–263n, 264).

2. Section 201.64 is added to subpart C to read as follows:

§ 201.64 Sodium labeling.

(a) The labeling of orally administered over-the-counter (OTC) drug products shall contain the sodium content per dosage unit (e.g., tablet, teaspoonful) if the sodium content of a single recommended dose of the product (which may be one or more dosage units) is 5 milligrams or more.

(b) The sodium content shall be expressed in milligrams per dosage unit and shall include the total amount of sodium regardless of the source, i.e., from both active and inactive ingredients. The sodium content shall be rounded off to the nearest whole number when the dosage unit contains less than 5 milligrams, to the nearest 5 milligram

increment (5, 10, 15, etc.) when the dosage unit contains 5 to 140 milligrams, and to the nearest 10 milligram increment (140, 150, etc.) when the dosage unit contains greater than 140 milligrams.

(c) The labeling of all orally administered OTC drug products shall contain the following warning under the heading "Warning" (or "Warnings" if it appears with additional warning statements) if the amount of sodium present in the maximum recommended daily dose of the product is more than 140 milligrams: "Do not use this product if you are on a sodium restricted diet unless directed by a" (select one of the following: "Physician" or "doctor").

(d) The term "sodium free" may be used in the labeling of orally administered OTC drug products if the amount of sodium in the maximum recommended daily dose is less than 5 milligrams. For example, a product containing 4 milligrams sodium per tablet with directions to take one tablet daily may use the term "sodium free" in its labeling. However, when the recommended dose in an OTC drug monograph provides for the taking of more than one dosage unit per day, e.g., take one or two tablets, or take two tablets, the same product containing 4 milligrams sodium per tablet shall not use the term "sodium free" because the maximum recommeded daily dose contains 8 milligrams sodium.

(e) The term "very low sodium" may be used in the labeling of orally administered OTC drug produts if the amount of sodium in the maximum recommended daily dose is 35 milligrams or less.

(f) The term "low sodium" may be used in the labeling of orally administered OTC drug products if the amount of sodium in the maximum recommeded daily dose is 140 milligrams or less.

(g) The term "salt" is not synonymous with the term sodium and shall not be used interchangeably or substituted for the term "sodium."

PART 331—ANTACID PRODUCTS FOR OVER-THE-COUNTER (OTC) HUMAN USE

3. The authority citation for 21 CFR Part 331 continues to read as follows:

Authority: Secs. 201, 501, 502, 503, 505, 510, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 351, 352, 353, 355, 360, 371).

§ 331.30 [Amended]

4. Section 331.30 *Labeling of antacid products* is amended in Subpart D by removing paragraph (c)(5) and redesignating paragraphs (c)(6) and (c)(7) as paragraphs (c)(5) and (c)(6), respectively, and by removing paragraph (f) and redesignating paragraph (g) as paragraph (f).

Dated: March 19, 1991.

David A. Kessler,

Commissioner of Food and Drugs.

[FR Doc. 91–9671 Filed 4–24–91; 8:45 am]

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federal register

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April 25, 1991

Part V

Environmental Protection Agency

40 CFR Part 721
Significant New Uses of Certain Chemical Substances; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[OPTS-50591; FRL-3846-5]

RIN 2070-AB27

Significant New Uses of Certain Chemical Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is promulgating significant new use rules (SNURs) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for several chemical substances which were the subject of premanufacture notices (PMNs) and subject to TSCA section 5(e) consent orders issued by EPA. Today's action requires certain persons who intend to manufacture, import, or process these substances for a significant new use to notify EPA at least 90 days before commencing the manufacturing or processing of the substance for a use designated by this SNUR as a significant new use. The required notice will provide EPA with the opportunity to evaluate the intended use, and if necessary, to prohibit or limit that activity before it occurs. EPA is promulgating this SNUR using direct final procedures.

DATES: This rule shall be promulgated for purposes of judicial review at 1 p.m. Eastern Standard Time on May 9, 1991. The effective date of this rule is June 24, 1991. If EPA receives notice before May 28, 1991 that someone wishes to submit adverse or critical comments on EPA's action in establishing a SNUR for one or more of the chemical substances subject to this rule, EPA will withdraw the SNUR for the substance for which the notice of intent to comment is received and will issue a proposed SNUR providing a 30-day period for public comment.

ADDRESSES: Each comment or notice of intent to submit adverse or critical comment must bear the docket control number OPTS-50591 and the name(s) of the chemical substance(s) subject to the comment. Since some comments may contain confidential business information (CBI), all comments should be sent in triplicate to: TSCA Document Receipt Office (TS-790), Office of Toxic Substances, Environmental Protection Agency, rm. E-105, 401 M St., SW., Washington, DC 20460. Nonconfidential versions of comments on this rule will be placed in the rulemaking record and will be available for public inspection. The Supplementary Information section of this preamble contains additional information on submitting comments containing CBI.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Division (TS-799), Office of Toxic Substances, Environmental Protection Agency, rm. E-543-B, 401 M St., SW., Washington, DC 20460, Telephone: (202) 554-1404, TDD: (202) 554-0551.

SUPPLEMENTARY INFORMATION: This SNUR will require persons to notify EPA at least 90 days before commencing manufacturing or processing a substance for any activity designated by this SNUR as a significant new use. The supporting rationale and background to this rule are more fully set out in the preamble to EPA's first direct final SNURs at 55 FR 17376 on April 24, 1990. Consult that preamble for further information on the objectives, rationale, and procedures for the rules and on the basis for significant new use designations including provisions for developing test data.

I. Authority

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including those listed in section 5(a)(2). Once EPA determines that a use of a chemical substance is a significant new use, section 5(a)(1)(B) of TSCA requires persons to submit a notice to EPA at least 90 days before they manufacture, import, or process the substance for that use. The mechanism for reporting under this requirement is established under 40 CFR 721.10.

II. Applicability of General Provisions

General provisions for SNURs appear under subpart A of 40 CFR part 721. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the final rule. Rules on user fees appear at 40 CFR part 700. Persons subject to this SNUR must comply with the same notice requirements and EPA regulatory procedures as submitters of PMNs under section 5(a)(1)(A) of TSCA. In particular, these requirements include the information submission requirements of section 5(b) and 5(d)(1), the exemptions authorized by section 5(h)(1), (2), (3), and (5), and the regulations at 40 CFR part 720. Once EPA receives a SNUR notice, EPA may take regulatory action under section 5(e), 5(f), 6, or 7 to control the activities on which it has received the SNUR notice. If EPA does not take action, EPA is required under section 5(g) to explain in the Federal Register its reasons for not taking action.

Persons who intend to export a substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b). The regulations that interpret section 12(b) appear at 40 CFR part 707. Persons who intend to import a chemical substance identified in a final SNUR are subject to the TSCA section 13 import certification requirements, which are codified at 19 CFR 12.118 through 12.127 and 127.28 and must certify that they are in compliance with the SNUR requirements. The EPA policy in support of the import certification appears at 40 CFR part 707.

III. Substances Subject to This Rule

EPA is establishing significant new use and recordkeeping requirements for the following chemical substances under 40 CFR part 721 subpart E. In this unit, EPA provides a brief description for each substance, including its PMN number, chemical name (generic name if the specific name is claimed as CBI), CAS number (if assigned), basis for the action taken by EPA in the section 5(e) consent order or as a non-section 5(e) SNUR for the substance (including the statutory citation and specific finding), toxicity concerns, and the CFR citation assigned in the regulatory text section of this rule. The specific uses which are designated as significant new uses are cited in the regulatory text section of the rule by reference to 40 CFR part 721 subpart B where the significant new uses are described in detail. Certain new uses, including production limits and other uses designated in the rule are claimed as CBI. The procedure for obtaining confidential information is set out in Unit VII.

Where the underlying section 5(e) order prohibits the PMN submitter from exceeding a specified production limit without performing specific tests to determine the health or environmental effects of a substance, the tests are described in this unit. As explained further in Unit VI., the SNUR for such substances contains the same production limit, and exceeding the production limit is defined as a significant new use. Persons who intend to exceed the production limit must notify the Agency by submitting a significant new use notice at least 90 days in advance. Data on potential exposures or releases of the substances, testing other than that specified in the

section 5(e) order for the substances, or studies on analogous substances, which may demonstrate that the significant new uses being reported do not present an unreasonable risk, may be included with significant new use notification. In addition, this unit describes tests that are recommended by EPA to provide sufficient information to evaluate the substance, but for which no production limit has been established in the section 5(e) order. Descriptions of recommended tests are provided for informational purposes.

PMN Number: P-84-1167

Chemical Name: (generic) Substituted bis(hydroxyalkane) polymer with epichlorohydrin, acrylate.
CAS Number: Not available.
Effective date of section 5(e) consent order: February 15, 1985.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.956.

PMN Number: P-85-718

Chemical name: (generic) Di(alkanepolyol) ether, polyacrylate.
CAS Number: Not available.
Effective date of section 5(e) consent order: August 12, 1990.
Basis for 5(e) action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1028.

PMN Number: P-86-1088

Chemical name: (generic) Substituted hydroxyalkyl alkenoate, [[[[[(1-oxo-2-propenyl]oxy]alkoxy] carbonylamino] substituted] aminocarbonyl]oxy-.
CAS Number: Not available.
Effective date of section 5(e) consent order: January 28, 1987.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1237.

PMN Number: P-88-1211

Chemical name: Poly(oxy-1,2-ethanediyl), .α. -hydro-.ω.hydroxy-, ether with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol (3:1) di-2-propenoate, methyl ether.
CAS Number: 106158-22-9.
Effective date of section 5(e) consent order: October 31, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1702.

PMN Number: P-88-1690

Chemical name: (generic) Monomethoxy neopentyl glycol propoxylate monoacrylate.
CAS Number: Not available.
Effective date of section 5(e) consent order: October 16, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1456.

PMN Number: P-88-1691

Chemical name: (generic) Polyalkylene glycol alkyl ether acrylate.
CAS Number: Not available.
Effective date of section 5(e) consent order: August 7, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1036.

PMN Number: P-88-1763

Chemical name: Ethane, 2-chloro-1,1,1,2-tetrafluoro-.
CAS Number: 2837-89-0.
Effective date of section 5(e) consent order: October 16, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i), (ii)(I), and (ii)(II) of TSCA based on a finding that this substance may present an unreasonable risk of injury to health, will be produced in substantial quantities, and there may be significant or substantial human exposure to the substance.
Toxicity concern: Similar substances have been shown to cause cancer, developmental toxicity, neurotoxicity, and chronic liver effects in laboratory animals.
Recommended testing: EPA has determined that a 90-day inhalation toxicity study in rats (40 CFR 798.2650) would help characterize possible liver toxicity and neurotoxicity of the substance, a two-species developmental inhalation toxicity study (40 CFR 798.4900) would help characterize possible developmental toxicity of the substance, and a 2-year, two-species inhalation bioassay (40 CFR 798.3300) would help characterize the possible carcinogenicity of the substance. The PMN submitter has agreed to submit the above information prior to exceeding specified production limits.
CFR Citation: 40 CFR 721.1006.

PMN Numbers: P-88-2179 and P-89-539

Chemical name: Oxirane, 2,2'-(1,6-hexanediylbis(oxymethylene)) bis-.
CAS Number: 16086-31-4.
Effective date of section 5(e) consent order: October 12, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health and the environment.
Toxicity concern: Substances similar to the PMN substance have been shown to cause cancer and mutagenic and reproductive effects in test animals. Similar substances have also been

shown to cause toxicity to aquatic organisms.
Recommended testing: A 90–day oral subchronic study with special attention given to the pathology of the reproductive organs (40 CFR 798.2650) is necessary to understand potential reproductive effects and is required to be submitted prior to exceeding a specified production limit. A 2–year, two-species rodent bioassay (40 CFR 798.3300) performed via the oral route of exposure, is necessary to characterize possible carcinogenicity of the substance. To characterize the PMN substance's potential effects to aquatic organisms, a fish 96–hour acute study, a daphnid 48–hour acute study, and an algal 96–hour acute study would be necessary.
CFR Citation: 40 CFR 721.1502.

PMN Number: P–88–2180

Chemical name: Poly[oxy(methyl-1,2-ethanediyl)],α,α'-[2,2-dimethyl-1,3-propanediyl]bis[3-(oxiranymethoxy)-.
CAS Number: Not available.
Effective date of section 5(e) consent order: October 12, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that the substance may present an unreasonable risk of injury to human health and the environment.
Toxicity concern: Substances similar to the PMN substance have been shown to cause cancer and mutagenic and reproductive effects in test animals. Similar substances have also been shown to cause toxicity to aquatic organisms.
Recommended testing: A 90–day oral subchronic study with special attention given to the pathology of the reproductive organs (40 CFR 798.2650) is necessary to understand potential reproductive effects and is required to be submitted prior to exceeding a specified production limit. A 2–year, two-species rodent bioassay (40 CFR 798.3300) performed via the oral route of exposure, is necessary to characterize possible carcinogenicity of the substance. To characterize the PMN substance's potential effects to aquatic organisms, a fish 96–hour acute study, a daphnid 48–hour acute study, and an algal 96–hour acute study would be necessary.
CFR Citation: 40 CFR 721.1704.

PMN Number: P–88–2181

Chemical name: Poly(oxy-1,2-ethanediyl), α,α'- [(1-methylethylidene)di-4,1-phenylene]bis[3-(oxiranylmethoxy)-.
CAS Number: 54140–64–6.
Effective date of section 5(e) consent order: October 12, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that the substance may present an unreasonable risk of injury to human health and the environment.
Toxicity concern: Substances similar to the PMN substance have been shown to cause cancer and mutagenic and reproductive effects in test animals. Similar substances have also been shown to cause toxicity to aquatic organisms.
Recommended testing: A 90–day oral subchronic study with special attention given to the pathology of the reproductive organs (40 CFR 798.2650) is necessary to understand potential reproductive effects and is required to be submitted prior to exceeding a specified production limit. A 2–year, two-species rodent bioassay (40 CFR 798.3300) performed via the oral route of exposure, is necessary to characterize possible carcinogenicity of the substance. To characterize the PMN substance's potential effects to aquatic organisms, a fish 96–hour acute study, a daphnid 48–hour acute study, and an algal 96–hour acute study would be necessary.
CFR Citation: 40 CFR 721.1706.

PMN Number: P–88–2188

Chemical name: Poly(oxy-1,2-ethanediyl), α-hydro-3-(oxiranylmethoxy)-, ether with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol (3:1).
CAS Number: 52495–71–3.
Effective date of section 5(e) consent order: October 12, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that the substance may present an unreasonable risk of injury to human health and the environment.
Toxicity concern: Substances similar to the PMN substance have been shown to cause cancer and mutagenic and reproductive effects in test animals. Similar substances have also been shown to cause toxicity to aquatic organisms.
Recommended testing: A 90–day oral subchronic study with special attention given to the pathology of the reproductive organs (40 CFR 798.2650) is necessary to understand potential reproductive effects and is required to be submitted prior to exceeding a specified production limit. A 2–year, two-species rodent bioassay (40 CFR 798.3300) performed via the oral route of exposure, is necessary to characterize possible carcinogenicity of the substance. To characterize the PMN substance's potential effects to aquatic organisms, a fish 96–hour acute study, a daphnid 48–hour acute study, and an algal 96–hour acute study would be necessary.
CFR Citation: 40 CFR 721.1708.

PMN Number: P–89–626

Chemical name: (generic) Alkylenebis(substituted carbomonocycle), epichlorohydrin, disubstituted heteromonocycle, acrylate polymer.
CAS Number: Not available.
Effective date of section 5(e) consent order: April 20, 1990
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on the finding that the substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2–year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1143.

PMN Number: P–89–1072

Chemical name: (generic) Oxyalkanepolyol polyacrylate.
CAS Number: Not available.
Effective date of section 5(e) consent order: June 14, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that the substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that the results of a 2–year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible effects of the substance.
CFR Citation: 40 CFR 721.1614.

PMN Number: P–89–1081

Chemical name: (generic) Reaction product of alkyl carboxylic acids, alkane polyols, alkyl acrylate, and isophorone diisocyanate.
CAS Number: Not available.
Effective date of section 5(e) consent order: May 9, 1990.
Basis for action: The Order was issued under section 5(e)(1)(a)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.

Recommended testing: EPA has determined that the results of a 2–year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1247.

PMN Number: P–89–1093

Chemical name: Methane, bromodifluoro-.
CAS Number: 1511–62–2.
Effective date of section 5(e) consent order: September 28, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i), (ii)(I), and (ii)(II) of TSCA based on a finding that this substance may present an unreasonable risk of injury to health, will be produced in substantial quantities, and that there may be significant or substantial human exposure to the substance.
Toxicity concern: Similar substances have been shown to cause mutagenicity, kidney and liver toxicity, developmental toxicity, reproductive toxicity, neurotoxicity, and cancer in laboratory animals.
Recommended testing: EPA has determined that the results of a functional observational battery (40 CFR 798.6050), motor activity testing (40 CFR 798.6200), and neuropathology testing (40 CFR 798.6400) would help characterize the possible neurotoxicity of the substance, a 90–day oral rat toxicity study (40 CFR 798.2650) would help characterize the possible subchronic toxicity of the substance, two-species oral developmental toxicity testing would help characterize the possible developmental toxicity of the substance, and a 2–year, two-species oral bioassay (40 CFR 798.3300) would help characterize the possible carcinogenicity of the substance. The PMN submitter has agreed to submit the results of the tests, with the exception of the 2–year bioassay, prior to exceeding specified production limits.
CFR Citation: 40 CFR 721.1296.

PMN Number: P–89–1104

Chemical name: (generic) Polymer of substituted phenol, formaldehyde, epichlorohydrin, and disubstituted benzene.
CAS Number: Not available.
Effective date of section 5(e) consent order: November 7, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to health.
Toxicity concern: Substances similar to the PMN substance have been shown to cause reproductive system toxicity and cancer.
Recommended testing: EPA has determined that the results of a 90–day oral rat toxicity study (40 CFR 798.2650) would help characterize the possible reproductive toxicity of the substance and the results of a 2–year two-species bioassay (40 CFR 798.3300) would help characterize the possible carcinogenicity of the substance. The PMN submitter has agreed to submit the results of the tests, with the exception of the 2–year bioassay, prior to exceeding specified production limits.
CFR Citation: 40 CFR 721.1888.

PMN Number: P–89–1135

Chemical name: 2-Propenoic acid [octahydro-4, 7-methano-1*H*-indene-1,5(1,6 or 2,5)-diyl]bis(methylene) ester.
CAS Number: Not available.
Effective date of section 5(e) consent order: April 25, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that the substance may present an unreasonable risk of injury to human health.
Toxicity concern: Substances similar to the PMN substance have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2–year rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1830.

PMN Number: P–90–333

Chemical name: 2-Propenoic acid, 2-methyl-, 2-[3-(2*H*-benzotriazol-2-yl)-4-hydroxyphenyl]ethyl ester.
CAS Number: 96478–09–0
Effective date of section 5(e) consent order: November 19, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that the substance may present an unreasonable risk of injury to health.
Toxicity concern: Based on analogue data, the PMN substance may cause cancer, mutagenicity, reproductive toxicity, liver, kidney, and blood toxicity, immunotoxicity, and sensitization.
Recommended testing: EPA has determined that the results of a 90–day subchronic (40 CFR 798.2650), a two-generation reproduction study (40 CFR 798.4700), an *in vitro* gene mutation assay (40 CFR 798.5300), and a dermal sensitization (40 CFR 798.4100), would help characterize the possible toxicity of the PMN substance. The PMN submitter has agreed submit the results of the tests prior to exceeding the specified production limit. Additionally, the Agency has determined that the results of a 2–year, two-species rodent bioassay study (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1817.

PMN Number: P–90–335

Chemical name: (generic) 2-Substituted benzotriazole.
CAS Number: Not available.
Effective date of section 5(e) consent order: November 19, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that the substance may present an unreasonable risk of injury to health.
Toxicity concern: Based on analogue data the PMN substance may cause cancer/mutagenicity, reproductive toxicity, liver, kidney, and blood toxicity, immunotoxicity, and sensitization.
Recommended testing: The Agency has determined that the results of testing specified for P–90–333 (with the exception of the bioassay), as well as an *in vitro* gene mutation assay (40 CFR 798.5300), and a dermal sensitization (40 CFR 798.4100) for P–90–335—if the results of the dermal sensitization test on P–90–333 are positive—would help characterize the toxicity of the PMN substance. The PMN submitter has agreed to submit the results of the tests prior to exceeding the specified production limit.
CFR Citation: 40 CFR 721.586.

PMN Number: P–90–384

Chemical name: Phosphoric acid, C_{6-12}-alkyl esters, compound with 2-(dibutylamino) ethanol.
CAS Number: 129733–59–1.
Basis for action: The PMN substance is an anionic surfactant that will be used as an antistatic agent for synthetic fiber processing and its production volume is estimated to be 13,000 kg/yr. Test data on structurally similar anionic surfactants indicate that the PMN substance may cause toxicity to aquatic organisms. Based on such data, EPA expects toxicity to aquatic organisms to occur at a concentration of 700 ppb of the PMN substance in surface waters. Because of information provided by the PMN submitter, EPA did not find it necessary to issue a section 5(e) consent order to control the activities described in the PMN. Specifically, EPA has determined that use of the substance as an antistatic agent for synthetic fiber processing as described in the PMN does not present an unreasonable risk to aquatic organisms because release of the substance would not result in

surface water concentrations exceeding the environmental concern level.

EPA has determined that increases in production volume by the submitter or other users could result in releases to surface waters where the concentration of the PMN substance could be greater than 700 ppb. Based on this information, the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that the results of the following acute aquatic toxicity testing would help characterize possible environmental effects of the substance: Algal (40 CFR 797.1050); daphnid (40 CFR 797.1300); and fish (40 CFR 797.1400). These tests should be conducted with flow-through conditions and measured concentrations.

CFR Citation: 40 CFR 721.1610.

PMN Number: P-90-440

Chemical name: (generic) Substituted carboheterocyclic butane tetracarboxylate.

CAS Number: Not available.

Effective date of section 5(e) consent order: November 1, 1990.

Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health and the environment.

Toxicity concern: Substances similar to the PMN substance have been shown to cause immunotoxicity, liver, systemic, blood, and reproductive toxicity, and toxicity to aquatic organisms.

Recommended testing: EPA has determined that the results of the following testing would help characterize possible health effects of the substance: A 90-day oral (gavage) toxicity study (40 CFR 798.2650), with special emphasis on the hematology, lymphoid organ weights (spleen, thymus), and histology as well as the cellularity of the bone marrow, thymus, and spleen. The study should also include a well-conducted histopathologic examination of the testes plus staging of sperm to address the concern for reproductive system effects. The PMN submitter has agreed to submit the results of the tests prior to exceeding a specified production limit. EPA has determined that the results of the following testing would help characterize possible environmental effects of the substance: Algal acute toxicity (40 CFR 797.1050), daphnid acute toxicity (40 CFR 797.1300), and fish acute toxicity (40 CFR 797.1400).

CFR Citation: 40 CFR 721.2094.

PMN Number: P-90-456

Chemical name: (generic) Alkylbenzene sulfonate, amine salt.

CAS Number: Not available.

Basis for action: Test data on structurally similar substances indicate that the PMN substance may cause toxicity to aquatic organisms. Based on this data EPA expects toxicity to aquatic organisms to occur at a concentration of 40 ppb of the PMN substance in surface waters. EPA determined that the use as described in the PMN would not present an unreasonable risk because the substance would not be released to surface waters. EPA has determined, however, that other potential uses may result in releases to surface waters where the concentration of the PMN substance may be greater than 40 ppb. Based on this information, the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that the results of the following acute aquatic toxicity testing would help characterize possible environmental effects of the substance: Algal (40 CFR 797.1050); daphnid (40 CFR 797.1300); and fish (40 CFR 797.1400). These tests should be conducted with flow-through conditions and measured concentrations.

CFR Citation: 40 CFR 721.1897.

PMN Number: P-90-489

Chemical name: 3,6,9,12,15,18,21-Heptaoxatetratriaoctanoic acid, sodium salt.

CAS Number: 104503-68-6.

Basis for action: The PMN substance will be used as a pigment dispersant and its production volume is estimated to be 113.38 kg/yr. Test data on similar nonionic surfactants indicate that the PMN substance may cause toxicity to aquatic organisms. Based on this data EPA expects toxicity to aquatic organisms to occur at a concentration of 100 ppb of the PMN substance in surface waters. EPA determined that use of the substance as a pigment dispersant as described in the PMN did not present an unreasonable risk because the substance would not be released to surface waters. EPA has determined that potential uses, such as a component of detergents, could result in releases to surface waters where the concentration of the PMN substance could be greater than 100 ppb. Based on this information, the PMN substance meets the concern criteria at 721.170(b)(4)(iii).

Recommended testing: EPA has determined that the results of the following acute toxicity testing would help characterize possible environmental effects of the substance: Algal (40 CFR 797.1050); daphnid (40 CFR 797.1300); and fish (40 CFR 797.1400). These tests should be conducted with flow-through conditions and measured concentrations.

CFR Citation: 40 CFR 721.1137.

PMN Number: P-90-584

Chemical name: (generic) Caprolactone modified acrylate monomer.

CAS Number: Not available.

Effective date of section 5(e) consent order: October 31, 1990.

Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to health.

Toxicity concern: Similar chemicals have been shown to cause cancer in test animals.

Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.

CFR Citation: 40 CFR 721.756.

PMN Number: P-90-643

Chemical name: (generic) Bisalkylated fatty alkyl amine oxide.

CAS Number: Not available.

Basis for action: The PMN substance is an amine oxide used as a fuel additive. Test data on structurally similar amine oxides indicate that the PMN substance may cause toxicity to aquatic organisms. Based on this data, EPA expects toxicity to aquatic organisms to occur at a concentration of 80 ppb of the PMN substance in surface waters. EPA determined that use of the substance as described in the PMN did not present an unreasonable risk to the environment because the substance would not be released to surface waters in amounts which would result in surface water concentrations exceeding the concern level. However, EPA expects that releases during other potential uses could result in surface water concentrations of the PMN substance of greater than 80 ppb. Based on this information the PMN substance meets the concern criterion at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that the results of the following acute aquatic toxicity testing would help characterize possible environmental effects of the substance: Algal (40 CFR 797.1050); daphnid (40 CFR 797.1300); and fish (40 CFR 797.1400). These tests should be conducted with flow-through conditions and measured concentrations.

CFR Citation: 40 CFR 721.1497.

PMN Number: P-90-667

Chemical name: Formaldehyde, polymer with (chloromethyl)oxirane, 4,4'-(1-methyl ethylidene) bis[2,6-dibromophenol] and phenol, 2-methyl-2-propenoate.
CAS Number: Not available.
Effective date of section 5(e) consent order: October 24, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that the substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1064 .

PMN Number: P-90-668

Chemical name: 2-Propenenitrile, polymer with 1,3-butadiene, 3-carboxy-1-cyano-1-methylpropyl-terminated, polymers with epichlorohydrin, formaldehyde, 4,4'-(1-methyl ethylidene)bis[2,6-dibromophenol] and phenol, 2-methyl-2-propenoate.
CAS Number: Not available.
Effective date of section 5(e) consent order: October 24, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that the substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1798.

PMN Number: P-90-1285

Chemical name: 2-Propenoic acid, octahydro-4, 7-methano-1*H*-indenyl ester.
CAS Number: 79637-74-4.
Effective date of section 5(e) consent order: November 21, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1832 .

PMN Number: P-90-1393

Chemical name: 2-Propenenitrile, polymer with 1,3-butadiene, 3-carboxy-1-cyano-1-methylpropyl-terminated, polymers with bisphenol A, epichlorohydrin and 4,4'-(1-methylethylidene) bis[2,6-dibromophenol], dimethacrylate.
CAS Number: Not available.
Effective date of 5(e) consent order: October 24, 1990.
Basis for action: The Order was issued under section 5(e)(1)(A)(i) and (ii)(I) of TSCA based on a finding that this substance may present an unreasonable risk of injury to human health.
Toxicity concern: Similar substances have been shown to cause cancer in test animals.
Recommended testing: EPA has determined that a 2-year, two-species rodent bioassay (40 CFR 798.3300) would help characterize possible carcinogenicity of the substance.
CFR Citation: 40 CFR 721.1797.

IV. Objectives and Rationale of the Rule

During review of the PMNs submitted for the chemical substances that are subject to this SNUR, EPA concluded that for all but four of the substances (P-90-384, P-90-456, P-90-489, and P-90-643), regulation was warranted under section 5(e) of TSCA pending the development of information sufficient to make reasoned evaluations of the health or environmental effects of the substances. The basis for such findings is outlined in Unit III. of this preamble. Based on these findings, section 5(e) consent orders requiring the use of appropriate controls were negotiated with the PMN submitters; the SNUR provisions for these substances designated herein are consistent with the provisions of the section 5(e) orders.

In each of the cases for which the proposed uses are not regulated under a section 5(e) order, EPA determined that one or more of the criteria of concern established at § 721.170 were met.

EPA is issuing this SNUR for specific chemical substances which have undergone premanufacture review to ensure the following objectives: That EPA will receive notice of any company's intent to manufacture, import, or process a listed chemical substance for a significant new use before that activity begins; that EPA will have an opportunity to review and evaluate data submitted in a SNUR notice before the notice submitter begins manufacturing, importing, or processing a listed chemical substance for a significant new use; that, when necessary to prevent unreasonable risks, EPA will be able to regulate prospective manufacturers, importers, or processors of a listed chemical substance before a significant new use of that substance occurs; and that all manufacturers, importers, and processors of the same chemical substance which is subject to a section 5(e) order are subject to similar requirements.

V. Direct Final Procedure

EPA is issuing these SNURs as direct final rules, as described in § 721.160(c)(3) and § 721.170(d)(4). In accordance with § 721.160(c)(3)(ii), this rule will be effective June 24, 1991, unless EPA receives a written notice by May 28, 1991 that someone wishes to make adverse or critical comments on EPA's action. If EPA receives such a notice, EPA will publish a notice to withdraw the direct final SNUR(s) for the specific substance(s) to which the adverse or critical comments apply. EPA will then propose a SNUR for the specific substance(s) providing a 30-day comment period. This action establishes SNURs for several chemical substances. Any person who submits a notice of intent to submit adverse or critical comments must identify the substance and the new use to which it applies. EPA will not withdraw a SNUR for a substance not identified in a notice.

VI. Test Data and Other Information

EPA recognizes that section 5 of TSCA does not require developing any particular test data before submission of a SNUR notice. Persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them. In cases where a section 5(e) order requires or recommends certain testing, Unit III. of this preamble lists those recommended tests. However, EPA has established production limits in the section 5(e) orders for several of the substances regulated under this rule, in view of the lack of data on the potential health and environmental risks that may be posed by the significant new uses or increased exposure to the substances. These production limits cannot be exceeded unless the PMN submitter first submits the results of toxicity tests that would permit a reasoned evaluation of the potential risks posed by these substances. Under recent consent orders, each PMN submitter is required to submit each study at least 14 weeks (earlier orders required submissions at least 12 weeks) before reaching the

specified production limit. Listings of the tests specified in the section 5(e) orders are included in Unit III. of this preamble. The SNURs contain the same production volume limits as the consent orders. Exceeding these production limits is defined as a significant new use. The recommended studies may not be the only means of addressing the potential risks of the substance. However, SNUR notices submitted for significant new uses without any test data may increase the likelihood that EPA will take action under section 5(e), particularly if satisfactory test results have not been obtained from a prior submitter. EPA recommends that potential SNUR notice submitters contact EPA early enough so that they will be able to conduct the appropriate tests. SNUR notice submitters should be aware that EPA will be better able to evaluate SNUR notices which provide detailed information on:

(1) Human exposure and environmental release that may result from the significant new use of the chemical substances.

(2) Potential benefits of the substances.

(3) Information on risks posed by the substances compared to risks posed by potential substitutes.

VII. Procedural Determinations

EPA is establishing through this rule some significant new uses which have been claimed as CBI. EPA has decided it is appropriate to keep this information confidential to protect the interest of the original PMN submitter. EPA promulgated a procedure to deal with the situation where a specific significant new use is CBI. This procedure appears in § 721.575(b)(1) and is similar to that in § 721.11 for situations where the chemical identity of the substance subject to a SNUR is CBI. This procedure is cross-referenced in each of these SNURs.

A manufacturer or importer may request EPA to determine whether a proposed use would be a significant new use under this rule. Under the procedure incorporated from § 721.575(b)(1), a manufacturer or importer must show that it has a *bona fide* intent to manufacture or import the substance and must identify the specific use for which it intends to manufacture or import the substance. If EPA concludes that the person has shown a *bona fide* intent to manufacture or import the substance, EPA will tell the person whether the use identified in the *bona fide* submission would be a significant new use under the rule. Since most of the chemical identities of the substances subject to these SNURs are also CBI, manufacturers and processors can combine the *bona fide* submission under the procedure in § 721.575(b)(1) with that under § 721.11 into a single step.

If a manufacturer or importer is told that the production volume identified in the *bona fide* submission would not be a significant new use, i.e. it is below the level that would be a significant new use, that person can manufacture or import the substance as long as the aggregate amount does not exceed that identified in the *bona fide* submission to EPA. If the person later intends to exceed that volume, a new *bona fide* submission would be necessary to determine whether that higher volume would be a significant new use. EPA is considering whether to adopt a special procedure for use when CBI production volume is designated as a significant new use. Under such a procedure, a person showing a *bona fide* intent to manufacture or import the substance, under the procedure described in § 721.11, would automatically be informed of the production volume that would be a significant new use. Thus the person would not have to make multiple *bona fide* submissions to EPA for the same substance to remain in compliance with the SNUR, as could be the case under the procedures in § 721.575(b)(1).

VIII. Applicability of Rule to Uses Occurring Before Effective Date of the Final Rule

To establish a significant "new" use, EPA must determine that the use is not ongoing. The chemical substances subject to this rule have recently undergone premanufacture review. Section 5(e) orders have been issued in all but one case and notice submitters are prohibited by the section 5(e) orders from undertaking activities which EPA is designating as significant new uses. In cases where EPA has not received a Notice of Commencement (NOC) and the substance has not been added to the Inventory, no other person may commence such activities without first submitting a PMN. For substances for which an NOC has not been submitted at this time, EPA has concluded that the uses are not ongoing. However, EPA recognizes in cases when chemical substances identified in this SNUR are added to the Inventory prior to the efective date of the rule, the substances may be manufactured, imported, or processed by other persons for a significant new use as defined in this rule before the efective date of the rule. However, 14 of the 30 substances contained in this rule have CBI chemical identities, and since EPA has received a limited number of post-PMN *bona fide* submissions, the Agency believes that it is highly unlikely that many, if any, of the significant new uses described in the following regulatory text are ongoing. As discussed at 55 FR 17376 (April 24, 1990), EPA has decided that the intent of section 5(a)(1)(B) is best served by designating a use as a significant new use as of this date of publication rather than as of the efective date of the rule. Thus, persons who begin commercial manufacture, import, or processing of the substances regulated through this SNUR will have to cease any such activity before the effective date of this rule. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires.

EPA has promulgated provisions to allow persons to comply with this SNUR before the efective date. If a person were to meet the conditions of advance compliance in § 721.45(h) (53 FR 28354, July 17, 1988), the person will be considered to have met the requirements of the final SNUR for those activities. If persons who begin commercial manufacture, import, or processing of the substance between publication and the efective date of the SNUR do not meet the conditions of advance compliance, they must cease that activity before the effective date of the rule. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires.

IX. Economic Analysis

EPA has evaluated the potential costs of establishing significant new use notice requirements for potential manufacturers, importers, and processors of the chemical substance subject to this rule. EPA's complete economic analysis is available in the public record for this rule (OPTS–50581).

X. Rulemaking Record

EPA has established a record for this rulemaking (docket control number OPTS–50591). The record includes information considered by EPA in developing this rule. A public version of the record without any confidential business information is available in the TSCA Public Docket Office from 8 a.m. to 12 p.m. and 1 p.m. to 4 p.m., Monday through Friday, except legal holidays. The TSCA Public Docket Office is located at rm. NE-G004, 401 M St., SW., Washington, DC.

XI. Regulatory Assessment Requirements

A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a rule is "major" and therefore requires a Regulatory Impact Analysis. EPA has determined that this rule will not be a "major" rule because it will not have an effect on the economy of $100 million or more, and it will not have a significant effect on competition, costs, or prices. While there is no precise way to calculate the total annual cost of compliance with this rule, EPA estimates that the cost for submitting a significant new use notice would be approximately $4,500 to $11,000, including a $2,500 user fee payable to EPA to offset EPA costs in processing the notice. EPA believes that, because of the nature of the rule and the substances involved, there will be few SNUR notices submitted. Furthermore, while the expense of a notice and the uncertainty of possible EPA regulation may discourage certain innovation, that impact will be limited because such factors are unlikely to discourage an innovation that has high potential value.

This regulation was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), EPA has determined that this rule would not have a significant impact on a substantial number of small businesses. EPA has not determined whether parties affected by this rule would likely be small business. However, EPA expects to receive few SNUR notices for the substances. Therefore, EPA believes that the number of small businesses affected by this rule will not be substantial, even if all of the SNUR notice submitters were small firms.

C. Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by OMB under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), and have been assigned OMB control number 2070–0012.

Public reporting burden for this collection of information is estimated to vary from 30 to 170 hours per response, with an average of 100 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM–223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to Office of Management and Budget, Paperwork Reduction Project (2070–0012), Washington, D.C. 20503.

List of Subjects in 40 CFR Part 721

Chemicals, Environmental protection, Hazardous materials, Reporting and recordkeeping requirements, Significant new uses.

Dated:April 17, 1991.

Victor J. Kimm,

Acting Assistant Administrator for Pesticides and Toxic Substances.

Therefore, 40 CFR part 721 is amended as follows:

PART 721—[AMENDED]

1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604 and 2607.

2. By adding new § 721.586 to subpart E to read as follows:

§ 721.586 2-Substituted benzotriazole.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as 2-substituted benzotriazole (PMN P–90–335) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(iii), (a)(3), (a)(4), (a)(5)(i), (a)(5)(ii), (a)(5)(iii), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), and (b) (concentration set at 0.1 percent).

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (g)(1)(i), (g)(1)(ii), (g)(1)(iv), (g)(1)(vi), (g)(1)(viii), (g)(2)(i), (g)(2)(ii), (g)(2)(iii), (g)(2)(iv), (g)(5), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(l) and (q).

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), (c)(4), (where N = 80). However, contrary to § 721.91(a)(4), if the waste stream containing the PMN substance will be treated using biological treatment (activated sludge or equivalent) plus clarification, then the amount of PMN substance reasonably likely to be removed from the waste stream by such treatment may be subtracted in calculating the number of kilograms released. No more than 75 percent removal efficiency may be attributed to such treatment.

(b) *Special requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (i), and (k).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

3. By adding new § 721.756 to subpart E to read as follows:

§ 721.756 E-Caprolactone modified 2-hydroxyethyl acrylate monomer.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as *E*-caprolactone modified 2-hydroxyethyl acrylate monomer (PMN P90-584) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* § 721.63 (a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 125(a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The

provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

4. By adding new § 721.956 to subpart E to read as follows:

§ 721.956 Substituted bis(hydroxyalkane) polymer with epichlorohydrin, acrylate.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as substituted bis(hydroxyalkane) polymer with epichlorohydrin, acrylate (PMN P–84–1167) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125(a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

5. By adding new § 721.1006 to subpart E to read as follows:

§ 721.1006 Ethane, 2-chloro-1,1,1,2-tetrafluoro-

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as ethane, 2-chloro-1,1,1,2-tetrafluoro- (PMN P–88–1763) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e), (f), (g)(5). The following additional human hazard precautionary statement shall appear on the MSDS as specified in § 721.72(c):

Inhalation of high concentrations of vapor is harmful and may cause heart irregularities, unconsciousness, or death. Intentional misuse can be fatal. Vapor reduced oxygen available for breathing and is heavier than air. Liquid contact causes frostbite. The effects in animals from single exposure by inhalation include central nervous system effects, anesthesia, and decreased blood pressure. Cardiac sensitization occurred in dogs exposed to a concentration of 2.5 percent in air and given an intravenous epinephrine challenge. Repeated exposures produced increased liver weights, anesthetic effects, irregular respiration, poor coordination, and nonspecific effects such as decreased body weight gain. However, no irreversible effects were seen as evidenced by histopathologic evaluation. As part of an extensive toxicology program, halogenated chlorofluorocarbon-124 will be tested in subchronic, developmental, and chronic/cancer studies. Avoid breathing high concentration of vapor. Use with sufficient ventilation to keep employee exposure below recommended limits. Avoid contact of liquid with skin and eyes. Wear chemical splash goggles and lined butyl gloves. Do NOT allow product to contact open flame or electrical heating elements because dangerous decomposition products may form.

The following additional human health hazard precautionary statements shall appear on each label as specified in § 721.72(b):

Inhalation of high concentrations of this substance in vapor form may cause:
(a) Heart irregularities.
(b) Unconsciousness.
(c) Death.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(q). In addition, it is a significant new use to use this substance as a blowing agent in the manufacture of structural insulation foams for commercial or consumer purposes.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance, as specified in § 721.125(a) through (c), and (f) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012.)

6. By adding new § 721.1028 to subpart E to read as follows:

§ 721.1028 Di(alkanepolyol) ether, polyacrylate.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as di(alkanepolyol) ether, polyacrylate (PMN P–85–718) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

7. By adding new § 721.1036 to subpart E to read as follows:

§ 721.1036 Polyalkylene glycol alkyl ether acrylate.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The substance identified generically as poly alkylene glycol ether acrylate (PMN P–88–1691) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a),

(b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and other consumer activities.* Requirements as specified in § 721.80(o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125(a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

8. By adding new § 721.1064 to subpart E to read as follows:

§ 721.1064 Formaldehyde, polymer with (chloromethyl)oxirane, 4,4'-(1-methyl ethylidene)bis[2,6-dibromophenol] and phenol, 2-methyl-2-propenoate.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as formaldehyde, polymer with (chloromethyl)oxirane, 4,4'-(1-methylethylidene)bis[2,6-dibromophenol] and phenol, 2-methyl-2-propenoate (PMN P–90–667) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of these substances, as specified in § 721.125(a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under control number 2070–0012)

9. By adding new § 721.1137 to subpart E to read as follows:

§ 721.1137 3,6,9,12,15,18,21-Heptaoxatetratriaoctanoic acid, sodium salt.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as 3,6,9,12,15,18,21-heptaoxatetratriaoctanoic acid, sodium salt is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new use is:

(i) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(ii) [Reserved].

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance, as specified in § 721.125 (a), (b), (c), and (k).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

10. By adding new § 721.1143 to subpart E to read as follows:

§ 721.1143 Alkylenebis (substituted carbomonocycle), epichlorohydrin, disubstituted heteromonocycle, acrylate polymer.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as alkylenebis(substituted carbomonocycle), epichlorohydrin, disubstituted heteromonocycle, acrylate polymer (PMN P–89–626) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities. Requirements as specified in § 721.80(o).*

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

11. By adding new § 721.1237 to subpart E to read as follows:

§ 721.1237 Substituted hydroxyalkyl alkenoate, [(1-oxo-2-propenyl)oxy]alkoxy] carbonylamino] substituted] aminocarbonyl]oxy-.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as substituted hydroxyalkyl alkenoate, [(1-oxo-2-propenyl)oxy]alkoxy]carbonylamino] substituted] aminocarbonyl]oxy- (PMN P–86–1088) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(ii), (a)(6)(iv), (b) (concentration set a 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manaufacturers, importers, and processors of this substance: § 721.125(a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

12. By adding new § 721.1247 to subpart E to read as follows:

§ 721.1247 Reaction product of alkyl carboxylic acids, alkane polyols, alkyl acrylate, and isophorone diisocyanate.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance generically identified as reaction product of alkyl carboxylic acids, alkane polyols, alkyl acrylate, and isophorone diisocyanate, (PMN P–89–1081) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in section § 721.72 (a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f); (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(b) *Special requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

13. By adding new § 721.1296 to subpart E to read as follows:

§ 721.1296 Methane, bromodifluoro- .

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as methane, bromodifluoro- is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (g)(1)(iii), (g)(1)(iv), (g)(1)(v), (g)(1)(vi), (g)(1)(vii), (g)(1)(ix), (g)(2)(ii), (g)(2)(iii), and (g)(5).

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (q), (use in portable fire extinguishers intended for consumer use, use in a facility other than a normally unoccupied facility).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance, as specified in § 721.125(a) through (c), (f) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

14. By adding new § 721.1456 to subpart E to read as follows:

§721.1456 Monomethoxy neopentyl glycol propoxylate monoacrylate.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The substance identified generically as monomethoxy neopentyl glycol propoxylate monoacrylate (PMN P–88–1690) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

15. By adding new § 721.1497 to subpart E to read as follows:

§ 721.1497 Bisalkylated fatty alkyl amine oxide

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as bisalkylated fatty alkyl amine oxide (PMN P–90–643) is subject to reporting under this section for the significant new use described in paragraph (a)(2) of this section.

(2) The significant new use is:

(i) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) (concentration set at 80 ppb).

(ii) [Reserved].

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance, as specified in § 721.125(a), (b), and (c).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

16. By adding new § 721.1502 to subpart E to read as follows:

§721.1502 Oxirane, 2,2'-(1,6-hexanediylbis (oxymethylene)) bis-.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as oxirane, 2,2'-(1,6-hexanediylbis(oxymethylene))bis- (PMNs P–88–2179 and P–89–539) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1),(a)(3), (a)(4), (a)(5)(viii), (a)(5)(ix), (a)(6)(ii), and (b) (concentration set at 0.1 percent).

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at

0.1 percent), (f), (g)(1)(vi), (g)(1)(vii), (g)(2)(i), (g)(2)(ii), (g)(2)(iii), (g)(2)(iv), (g)(2)(v), (g)(3)(ii), (g)(4)(i), and (g)(5).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(l) and (q).

(iv) *Disposal.* Requirements as specified in § 721.85 (b)(1), (b)(2), (c)(1), and (c)(2).

(v) *Release to water.* Requirements as specified in § 721.90 (a)(2)(ii), (b)(1), and (c)(1). The following may be used as an alternative to the technologies in § 721.90(a)(2)(ii): Oil and grease separation.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (k).

(2) *Limitation of revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

17. By adding new § 721.1610 to subpart E to read as follows:

§ 721.1610 Phosphoric acid, C_{6-12}-alkyl esters, compounds with 2-(dibutylamino) ethanol.

(a) *Chemical substances and significant new uses subject to reporting.* (1) The chemical substances identified as phosphoric acid, C_{6-12}-alkyl esters, compounds with 2-(dibutylamino)ethanol (PMN P–90–384) are subject to reporting under this section for the significant new use described in paragraph (a)(2) of this section.

(2) The significant new use is:

(i) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) (concentration set at 700 ppb).

(ii) [Reserved].

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance, as specified in § 721.125(a), (b), (c) and (k).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

18. By adding new § 721.1614 to subpart E to read as follows:

§ 721.1614 Oxyalkanepolyol polyacrylate.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as oxyalkanepolyol polyacrylate (PMN P–89–1072) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent); (f); (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

19. By adding new § 721.1702 to subpart E to read as follows:

§ 721.1702 Poly(oxy-1,2-ethanediyl), .α.-hydro-.ω.hydroxy-, ether with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol (3:1) di-2-propenoate, methyl ether

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as poly(oxy-1,2-ethanediyl), .α.-hydro-.ω.-hydroxy-, ether with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol (3:1) di-2-propenoate, methyl ether (PMN P–88–1211) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 0.1percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

20. By adding new § 721.1704 to subpart E to read as follows:

§ 721.1704 Poly[oxy(methyl-1,2-ethanediyl)], α,α'-(2,2-dimethyl-1,3-propanediyl)bis[ω-(oxiranymethoxy)-.

(a) Chemical substance and significant new uses subject to reporting. (1) The chemical substance identified as poly[oxy(methyl-1,2-ethanediyl)], α,α,'-(2,2-dimethyl-1,3-propanediyl)bis[ω-(oxiranymethoxy)-(PMN P–88–2180) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1),(a)(3), (a)(4), (a)(5)(viii), (a)(5)(ix), (a)(6)(ii), and (b) (concentration set at 0.1 percent).

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (g)(1)(vi), (g)(1)(vii), (g)(2)(i), (g)(2)(ii), (g)(2)(iii), (g)(2)(iv), (g)(2)(v), (g)(3)(ii), (g)(4)(i), and (g)(5).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(l) and (q).

(iv) *Disposal.* Requirements as specified in § 721.85 (b)(1), (b)(2), (c)(1), and (c)(2).

(v) *Release to water.* Requirements as specified in § 721.90 (a)(2)(ii), (b)(1), and (c)(1). The following may be used as an alternative to the technologies in

§ 721.90(a)(2)(ii): Oil and grease separation.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (k).

(2) *Limitation of revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

21. By adding new § 721.1706 to subpart E to read as follows:

§ 721.1706 Poly(oxy-1,2-ethanediyl), α,α'-[(1-methylethylidene) di-4,1-phenylene] bis [ω-(oxiranylmethoxy)-.

(a) Chemical substance and significant new uses subject to reporting. (1) The chemical substance identified as poly(oxy-1,2-ethanediyl), α,α'-[(1-methylethylidene) di-4,1-phenylene] bis [ω-(oxiranylmethoxy)- (PMN P–88–2181) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(3), (a)(4), (a)(5)(viii), (a)(5)(ix), (a)(6)(ii), and (b) (concentration set at 0.1 percent).

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 0.1percent), (f), (g)(1)(vi), (g)(1)(vii), (g)(2)(i), (g)(2)(ii), (g)(2)(iii), (g)(2)(iv), (g)(2)(v), (g)(3)(ii), (g)(4)(i), and (g)(5).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(l) and (q).

(iv) *Disposal.* Requirements as specified in § 721.85 (b)(1), (b)(2), (c)(1), and (c)(2).

(v) *Release to water.* Requirements as specified in § 721.90 (a)(2)(ii), (b)(1), and (c)(1). The following may be used as an alternative to the technologies in § 721.90(a)(2)(ii): Oil and grease separation.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (k).

(2) *Limitation of revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

22. By adding new § 721.1708 to subpart E to read as follows:

§ 721.1708 Poly(oxy-1,2-ethanediyl), α-hydro-ω-(oxiranylmethoxy)-, ether with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol (3:1).

(a) Chemical substance and significant new uses subject to reporting. (1) The chemical substance identified as poly(oxy-1,2-ethanediyl),α-hydro-ω-(oxiranylmethoxy)-, ether with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol (3:1) (PMN P–88–2188) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(3), (a)(4), (a)(5)(viii), (a)(5)(ix), (a)(6)(ii), and (b) (concentration set at 0.1 percent).

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (g)(1)(vi), (g)(1)(vii), (g)(2)(i), (g)(2)(ii), (g)(2)(iii), (g)(2)(iv), (g)(2)(v), (g)(3)(ii), (g)(4)(i), and (g)(5).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(l) and (q).

(iv) *Disposal.* Requirements as specified in § 721.85 (b)(1), (b)(2), (c)(1), and (c)(2).

(v) *Release to water.* Requirements as specified in § 721.90(a)(2)(ii), (b)(1), and (c)(1). The following may be used as alternative to the technologies in § 721.90(a)(2)(ii): Oil and grease separation.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (k).

(2) *Limitation of revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

23. By adding new § 721.1797 to subpart E to read as follows:

§ 721.1797 2-Propenenitrile, polymer with 1,3-butadiene, 3-carboxy-1-cyano-1-methylpropyl-terminated, polymers with bisphenol A, epichlorohydrin, and 4,4'-(1methylethylidene)bis[2,6-dibromophenol], dimethacrylate.

(a) *Chemical substances and significant new uses subject to reporting.* (1) The chemical substances identified as 2-propenenitrile, polymer with 1,3-butadiene, 3-carboxy-1-cyano-1-methylpropyl-terminated, polymers with bisphenol A, epichlorohydrin, and 4,4'-(1-methylethylidene)bis[2,6-dibromophenol], dimethacrylate (PMN P–90–1393), are subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2)The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance, as specified in § 721.125(a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under control number 2070–0012)

24. By adding new § 721.1798 to subpart E to read as follows:

§ 721.1798 2-Propenenitrile, polymer with 1,3-butadiene, 3-carboxy-1-cyano-1-methylpropyl-terminated, polymers with epichlorohydrin, formaldehyde, 4,4'-(1-methylethylidene)bis[2,6-dibromophenol], and phenol, 2-methyl-2-propenoate.

(a) *Chemical substances and significant new uses subject to*

reporting. (1) The chemical substances identified as 2-propenenitirile, polymer with 1,3-butadiene, 3-carboxy-1-cyano-1-methylpropyl-terminated, polymers with epichlorohydrin, formaldehyde, 4,4'-(1-methylethylidene)bis[2,6-dibromophenol], and phenol, 2-methyl-2-propenoate (PMN P–90–668), are subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of these substances, as specified in § 721.125(a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMBcontrol number 2070–0012)

25. By adding new § 721.1817 to subpart E to read as follows:

§ 721.1817 2-Propenoic acid, 2-methyl-, 2-[3-(2H-benzotriazol-2-yl)-4-hydroxyphenyl]ethyl ester.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as 2-propenoic acid, 2-methyl-, 2-[3-(2*H*-benzotriazol-2-yl)-4-hydroxyphenyl]ethyl ester, (PMN P–90–333) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(3), (a)(4), (a)(5)(i), (a)(5)(ii), (a)(5)(iii), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), and (b) (concentration set at 0.1 percent).

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (g)(1)(i), (g)(1)(ii), (g)(1)(iv), (g)(1)(v), (g)(1)(vi), (g)(2)(i), (g)(2)(ii), (g)(2)(iii), (g)(2)(iv), (g)(5), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(l) and (q).

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), (c)(4), (where N = 80). However, contrary to § 721.91(a)(4), if the waste stream containing the PMN substance will be treated using biological treatment (activated sludge or equivalent) plus clarification, then the amount of PMN substance reasonably likely to be removed from the waste stream by such treatment may be subtracted in calculating the number of kilograms released. No more than 75 percent removal efficiency may be attributed to such treatment.

(b) *Special requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (i), and (k).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

26. By adding new § 721.1830 to subpart E to read as follows:

§ 721.1830 2-Propenoic acid [octahydro-4,7-methano-1H-indene-1, 5(1,6 or 2,5)-diyl]bis(methylene) ester.

(a) Chemical substance and significant new uses subject to reporting. (1) The chemical substance specifically identified as 2-propenoic acid [octahydro-4, 7-methano-1*H*-indene-1, 5(1,6 or 2,5)-diyl]bis(methylene) ester (PMN P–89–1135) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125 (a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

27. By adding new § 721.1832 to subpart E to read as follows:

§ 721.1832 2-Propenoic acid, octahydro-4, 7-methano-1H-indenyl ester.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as 2-propenoic acid, octahydro-4, 7-methano-1*H*-indenyl ester (PMN P–90–1285) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(ii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(i), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), (h)(2)(i)(D), and (h)(2)(iii)(A).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(iv) *Disposal.* Requirements as specified in § 721.85 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: Requirements as specified in § 721.125(a) through (j).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

28. By adding new § 721.1888 to subpart E to read as follows:

§ 721.1888 Polymer of substituted phenol, formaldehyde, epichlorohydrin, and disubstituted benzene.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as polymer of substituted phenol, formaldehyde, epichlorohydrin, and disubstituted benzene (PMN P–89–1104) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(3), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (g)(1)(vi), (g)(1)(vii), (g)(2)(i), (g)(2)(v), (g)(4)(i), and (g)(5). The following additional human hazard precautionary statement shall appear on each label as specified in § 721.72(b): Disposal restrictions apply.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(q).

(iv) *Disposal.* Requirements as specified in § 721.85(a)(1), (b)(1), and (c)(1).

(v) *Release to water.* Requirements as specified in § 721.90(c)(2)(v), or diatomaceous earth filtration.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance: § 721.125(a) through (k).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

29. By adding new § 721.1897 to subpart E to read as follows:

§ 721.1897 Alkylbenzene sulfonate, amine salt.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as alkylbenzene sulfonate, amine salt (PMN P–90–456) is subject to reporting under this section for the significant new use described in paragraph (a)(2) of this section.

(2) The significant new use is:

(i) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), (c)(1).

(ii) [Reserved].

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance, as specified in § 721.125(a), (b), (c), and (k).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

30. By adding new § 721.2094 to subpart E to read as follows:

§ 721.2094 Substituted carboheterocyclic butane tetracarboxylate.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as substituted butane tetracarboxylate (PMN P–90–440) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(3), (a)(4), (a)(5)(i), (a)(5)(ii), (a)(5)(iii), (a)(6)(i), (b) (concentration set at 1.0 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 1.0 percent), (f), (g)(1)(i), (g)(1)(iv), (g)(1)(vi), (g)(1)(viii), (g)(2)(i), (g)(2)(ii), (g)(2)(iii), (g)(2)(iv), (g)(2)(v), and (g)(5).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (f) and (q).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* The following recordkeeping requirements are applicable to manufacturers, importers, and processors of this substance, and specified in § 721.125(a) through (i).

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.575(b)(1) apply to this section.

(Approved by the Office of Management and Budget under OMB control number 2070–0012)

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federal register

Thursday
April 25, 1991

Part VI

Department of Health and Human Services

Public Health Service

Availability of Grants for Minority HIV Education/Prevention Demonstration Projects; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Availability of Grants for Minority HIV Education/Prevention Demonstration Projects

AGENCY: Office of Minority Health/ Office of Assistant Secretary for Health, PHS/DHHS.

ACTION: Notice of availability of funds and requests for applications.

AUTHORITY: This program is authorized under section 1707(d)(1) of the Public Health Service Act as amended, Public Law 101–527.

SUMMARY: The Office of Minority Health announces the availability of grants to provide support to public and private non-profit minority community-based organizations and minority institutions. These grants will be awarded for projects to demonstrate the effectiveness of minority-targeted health education and prevention strategies which will help to eliminate or reduce risk for acquiring or transmitting human immunodeficiency virus (HIV), and other health problems that are acquired and/or transmitted or associated with similar risk behaviors, e.g., substance abuse and sexually transmitted diseases (STDs). While the primary focus is on HIV infection education/prevention, all strategies must not only address HIV but must also include those health problems associated with risk behaviors underlying HIV transmission, e.g., STDs, substance abuse. Although Tuberculosis (T.B.) is not directly related to risk behaviors underlying HIV transmission, it is a serious health care problem aggravated by HIV infection and warrants special attention in HIV education/prevention information because of its high level of communicability.

ADDRESSES/CONTACTS: Applications must be prepared on Form PHS 5161. Requests for application kits and completed applications should be directed to Ms. Carolyn A. Williams, Grants Management Officer, Office of Minority Health, 5515 Security Lane, suite 1102, Rockville, MD 20852, 301/ 443–9870. In addition, technical assistance on issues involving business or administrative management should be directed to Ms. Carolyn A. Williams. Technical assistance on the programmatic content of the application may be obtained from Ms. Georgia Buggs, Office of Minority Health, 5515 Security Lane, suite 1102, Rockville, MD 20852, 301/443–9923. Data and referral for additional information which might be useful in preparation of grant applications can be obtained from the Office of Minority Health Resource Center, 1/800/444–6472. Information on a possible series of regional grants writing technical assistance workshops can also be obtained through the OMH Resource Center.

DEADLINE: To receive consideration, grant applications must be received by the Grants Management Officer by July 5, 1991. Applications will be considered as meeting the deadline if they are either: (1) Received at the above address on or before the deadline date, or (2) Sent to the above address on or before the deadline date and received in time for submission to the review panel. A legibly dated receipt from a commercial carrier or U.S. Postal Service will be accepted in lieu of the postmark. Private metered postmarks shall not be accepted as proof of timely mailing. Applications which do not meet the deadline will be considered late applications and will be returned to the applicant.

Availability of Funds

It is anticipated that the Office of Minority Health will have approximately $1 million available in Fiscal Year 1991 to support, under this announcement, up to 10 new awards in the range of $75,000–$100,000 each, per year. The specific amount funded will depend on the merit and scope of the proposed project and the overall availability of funds. Since a variety of approaches would represent valid responses to this announcement, a range of cost is expected among individual grants awarded.

Period of Support

Support may be requested for a total project period up to three years. Non-competing continuation awards for years two and three will be made subject to continued availability of funds and on the applicant's satisfactory performance during the prior year. Annual budgets can be requested up to a total of $100,000 (direct and indirect costs). It is anticipated that funds will be awarded before September 30, 1991.

SUPPLEMENTARY INFORMATION:

Relationship to National Goals for the Year 2000

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of *Healthy People 2000*, a PHS-led national activity of setting priority areas. This announcement, the Minority HIV Education/Prevention Demonstration Grant Program, is related to four of the 22 priority areas: (1) Alcohol and other drugs; (2) educational and community-based programs; (3) HIV infection; and (4) sexually transmitted diseases. Potential applicants may obtain a copy of Healthy People 2000 (Full Report: Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report: Stock No. 017–001–0473–1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (Telephone 202/783–3238).

Background

Infection with HIV results in a spectrum of disease. At one end of the spectrum are persons infected with HIV who look and feel perfectly healthy. At the opposite end are persons with AIDS who are visibly sick and require significant medical and psychosocial support. Between these two extremes, HIV infected persons may develop illnesses that range from mild to extremely serious. The interval between initial HIV infection and the presence of symptoms and signs that characterize AIDS is long and variable and may extend from several months to many years. A person who is infected with HIV, even while feeling healthy, may unknowingly infect others. Thus, the term "HIV infection" more appropriately describes the entire scope of this public health problem than the term "AIDS". HIV infection, especially in minority communities, does not occur as an isolated problem. It is intimately linked to many other health problems such as: Tuberculosis, substance abuse and sexually transmitted diseases like Syphilis and Hepatitis B.

Disproportionate Effect of HIV On Minorities

Current statistics indicate that Blacks and Hispanics are disproportionately represented among the more than 160,000 people with AIDS that have been reported in the United States. While Blacks and Hispanics respectively represent approximately 12% and 7% of the U.S. population, 28% of people with AIDS are Black and 1.6% are Hispanic. Asian-Pacific Islanders and Native Americans respectively represent 1.6% and 0.7% of the U.S. population and together currently account for less than 1% of people with AIDS. Although Asian/Pacific Islanders and Native Americans do not appear to be disproportionately affected by HIV infection, cultural and linguistic characteristics of these populations must also be considered in the development of effective HIV prevention programs.

There is a significant degree of geographical variation in the racial/ethnic distribution of people with HIV infection and AIDS. Over one-half of all minorities with AIDS reside in New York, New Jersey and Florida while approximately one-quarter of all non-minorities with HIV infection and AIDS live in these three states. Recognizing this variation is essential to understanding how the HIV epidemic has impacted upon various minority communities.

There are striking differences in patterns of transmission of HIV among Blacks and Hispanics compared to non-minority whites. Overwhelmingly, non-minority whites with HIV infection and AIDS are more likely than Blacks and Hispanics to have contracted the disease through male homosexual contact, or transfusion of blood or blood products (including hemophiliacs). Nevertheless, homosexual/bisexual contact between men is an important mode of HIV transmission among Blacks and Hispanics and can not be ignored as a significant transmission modality.

Injecting drug use (by sharing of HIV infected needles and other HIV contaminated drug paraphernalia including the syringe and the cooker used for filtering), unprotected heterosexual contact with an infected individual, and perinatal transmission (HIV spreading from infected mother to infant during pregnancy, delivery and possibly through breast milk during nursing) are more prevalent modes of transmission among Black and Hispanics than among whites. Furthermore, over 70% of heterosexuals, over 73% of women and 78% of children with AIDS are Black and Hispanic. It must be emphasized that people at risk for HIV infection become so because of behaviors, which may be influenced by multiple socioeconomic factors, not because of any inherent feature of race or ethnicity.

The behaviors that increase the risk of infection with HIV include: Unprotected sexual intercourse (homosexual or heterosexual) sharing HIV infected needles or other drug paraphernalia by people injecting drugs; having numerous sexual partners (homosexual or heterosexual). People who engage in more than one of these behaviors are at especially high-risk, for example, individuals who have unprotected sex with someone who injects drugs and shares needles or other "works". HIV infections associated with use of injected drugs involve not only drug users themselves, but their sex partners and infants as well. Users of non-injected drugs, e.g., crack, who sell sexual favors to support their habit often expose themselves to multiple potentially infected partners.

The relationship between smoking cocaine ("crack") and transmission of HIV infection is also of major concern. Although smoking crack does not directly transmit HIV, many persons who are dependent on this highly addictive drug exchange sex for drugs or the money to buy drugs. This practice has been shown to increase the risk of sexually transmitted diseases in some crack-using populations, which may foreshadow a similar increase in HIV infection associated with smoking crack.

At the present time there is no cure for HIV infection. Furthermore, there is no available curative treatment or vaccine to prevent HIV infection. Prevention through individual behavior change is the only method currently available to stop the spread of HIV infection. Additionally, HIV has increased the awareness of the importance of STDs and the dangers of unsafe sexual practices. Therefore, it is important that HIV education and prevention programs integrate STDs as health care problems associated with the high-risk behaviors underlying HIV transmission.

The following examples of STDs are limited and briefly described the magnitude of the STD problem. Potential applications should include a more comprehensive approach that focuses on HIV and its relationship to specific STDs. For example, describe the relationship between the prevalence of HIV with that of each STD, and in addition, determine if the increase in the specific STD is occurring in the same populations in which HIV rates are increasing.

Sexually Transmitted Diseases

Sexually transmitted diseases (STDs) are a diverse group of infections, caused by dissimilar microbial agents, which are grouped together because of certain common clinical and epidemiological features. Advent of HIV has heightened public awareness of the importance of STDs and the dangers of unsafe sexual practices. New knowledge has accumulated rapidly about old diseases; for instance, there is a reported link between cervical carcinoma and certain human papilloma virus (genital wart virus) infections.

Changes in sexual attitudes and practices have contributed to a resurgence of all venereal infections. Gonorrhea, for example, has tripled in incidence in the U.S. since 1963. Approximately three million cases now occur each year. The morbidity of gonococcal infections now exceeds that of syphilis. Reinfection is the norm, and it is not unusual for one patient to have 20 or more discreeet infections. STDs are more prevalent among some minority populations in the U.S. than they are among the majority populations. Primary and secondary syphilis occur 45 times as often among non-Hispanic blacks as among non-Hispanic whites according to morbidity reports in 1988 by the Centers for Disease Control (CDC).

Syphilis

Syphilis has become rare for much of the U.S. population, however, large differences in syphilis incidence exist among different racial and ethnic groups and among geographic areas. Between 1981 and 1989, the incidence of primary and secondary syphilis in the U.S. increased 34%, from 13.7 to 18.4 cases per 100,000 persons, the highest since 1949. The populations affected by syphilis also changed substantially. Racial differences in syphilis incidence increased (black-to-white incidence rate ratio in 1961 was 14.5 and in 1989 was 47.8), as did regional differences. Trends in syphilis incidence indicate changes in sexual behavior that may also determine future transmission of the human immunodeficiency virus. Syphilis is of unique importance among the sexually transmitted disease because early lesions will heal without specific therapy; however, serious systemic sequelae pose a major risk to the individual and transplacental infections to the offspring.

Use of crack cocaine and exchange of drugs for sex have been identified as substantial contributors to the syphilis epidemic in the U.S. Partner notification is an important part of efforts to control the spread of syphilis. However, in the current epidemic, many infected persons are users of illegal drugs who often cannot or will not provide sufficient information to allow follow-up and treatment of sex partners.

Herpes Simplex Virus Infection (HSV)

Genital herpes infection has reached epidemic proportions, causing a corresponding increase in public awareness and concern. Genital herpes differs from other STDs in its tendency for spontaneous recurrence. Its importance stems from the morbidity, both physical and psychological, of the recurrent genital lesions, the danger of transmission of fulminant, often fatal disease to newborn infants and the association with cervical carcinoma.

Cervical Cancer

Cervical cancer is thought to be, at least in part, a sexually transmitted

disease. Many epidemiological studies have found an increased risk of developing cervical cancer in females who have had multiple sex partners. More recently, researchers have found strong evidence to suggest that infection with certain strains of human papilloma virus (genital wart virus) may ultimately lead to cervical cancer.

Hepatitis B Virus

Hepatitis B virus (HBV) is a major cause of acute and chronic hepatitis, cirrhosis, and primary hepatocellular carcinoma. Each year, an estimated 300,000 persons, primarily young adults, are infected with HBV. One quarter become ill with jaundice, more than 10,000 require hospitalization, and an average of 250 die of fulminant disease. There are an estimated 750,000–1,000,000 infectious carriers currently in the United States. Approximately 25% of carriers develop chronic active hepatitis, which often progresses to cirrhosis. Also, HBV carriers have a risk of developing primary liver cancer that is 200–300 times higher than that of other persons. An estimated 4,000 persons die each year from hepatitis B-related cirrhosis, more than 800 die from hepatitis B-related liver cancer. Persons born in areas of high HBV endemicity and their descendants remain at high risk of infection, as do certain populations in which HBV is highly endemic (Alaskan Natives and Pacific Islanders).

Transmission of Hepatitis B in the United States is primarily through sexual or parental exposure. Common risk factors include homosexual activity, illicit parenteral drug use, sexual or household exposure to an Hepatitis-B-infected person and heterosexual activity with multiple partners, and occupational exposure to blood. Like HIV, HBV is transmitted in body fluids, especially blood and semen, and from pregnant women to their unborn children. There is a growing body of literature indicating the importance of heterosexual transmission of HBV in the U.S.A. Data from the Centers for Disease Control (CDC) surveillance systems suggest that 25% of reported cases result from heterosexual transmission. A recent study based on the National Health and Nutrition Examination Survey II (NHANES–II) indicates that among the general U.S. population, there is also a strong association between HBV infection and a positive test for syphilis.

Associated risk factors for cases of HBV reported to CDC have shown a marked shift from 1982 to 1987. Between 1982 and 1985, gay men accounted for 21% of reported cases: Intravenous drug users, 15%; heterosexual contacts, 19%; and factor unknown, 36%. Nine percent included household contacts, health exposures, and exposure to blood products. By 1987, gay men were only 9% of the total reported cases, whereas intravenous drug users had risen from 15% to 28%. Cases resulting from heterosexual contact increased from 19% to 24%, 34% were from unknown causes. Cases due to household products and health care exposures decreased from 9% to 5%.

The present strategy for hepatitis B prevention is to vaccinate those individuals at high risk of infection. Most persons receiving vaccine as a result of this strategy have been those at risk through occupational exposure, a group that accounts for approximately 4% of cases. The major deterrents to vaccinating the other high risk groups include their lack of knowledge about the risk of disease and its consequences, the lack of public sector programs, the cost of vaccines, and the inability to access most of the high risk populations.

Health Problem Aggravated by HIV

Tuberculosis (TB)

While TB is not a sexually transmitted disease or directly related to risk behaviors underlying HIV transmission, it is a serious health care problem aggravated by HIV infection. It warrants special attention in HIV education/prevention information because of its high level of communicability. Tuberculosis is a highly infectious disease to which urban and minority populations are especially prone. It is also a disease which expresses itself in persons with an immune-compromised status. In the past, poverty and malnutrition were the conditions which predisposed minorities to tuberculosis infection. Today, TB is one of the leading causes of morbidity and mortality among minorities with HIV infection. There is a significant link between TB and HIV. This association is reflected by the increased number of HIV-infected persons with TB and the more severe form of active TB infection. It is therefore very important that programs targeted at persons with or at risk for HIV infection fully understand the threat of TB and that the relationship of TB to HIV and education about self protection and prophylactic therapy be available to minority communities.

Strategies to eliminate or reduce high risk behaviors associated with HIV and sexually transmitted infections and tuberculosis must provide information about how they are transmitted from one person to another, the consequences of infection, how to avoid becoming infected, as well as specific skills for adopting and maintaining non-risky behaviors. These strategies require discussion of emotionally charged issues about very personal behaviors, such as sexual activity and practices, homosexuality, bisexuality, and drug use. To be effective, these strategies must specifically address culture, language, educational levels, and other socio-economic factors of the specific minority populations targeted.

Because of the heterogeneity of minority populations, including differences in risk factor profiles, the development of approaches to HIV and STD education/prevention will require creativity and innovation. Furthermore, these approaches must be presented by organizations and institutions that are credible to the targeted population. Community-based organizations that represent racial/ethnic minorities and minority institutions are uniquely qualified to influence individuals and foster community norms that will encourage and support appropriate behaviors. Supporting these organizations to initiate or expand education/prevention activities provides an opportunity to intensify the quality and scope of HIV and STD disease prevention for minority populations.

This announcement is the third notice of this grant program. Organizations funded through this grant program have directed their efforts to a variety of groups within a broad population spectrum, including minority men who have sex with men; Black and Hispanic youth and adults; Brazilians; Haitians; Portuguese; Native Americans; Asian and Pacific Islanders; Black, Hispanic and other minority women; homosexual, lesbian and bisexual adults. Others served by this grant program include homeless persons, intravenous and other drug users, sex workers, street youth, religious groups and incarcerated persons.

Intervention strategies have included: Training for youth peer educators; use of teen theater for Hispanic and black youth and adults; design and development of Spanish language "Fotonovels"; direct outreach; condom/bleach distribution; material development; and Train-the-Trainers.

Definitions

For the purposes of this grant program the following definitions are provided.

Minority Community-Based Organizations

A public or private non-profit organization which has a governing

board composed of 50% or more racial/ethnic minority members, has a significant number of minorities in key program positions, and has an established record of service to a racial and ethnic minority community or communities.

A local affiliate of a national minority organization which has a national governing board composed of 50% or more racial/ethnic minority members, has a significant number of minorities in key program positions, and has an established record of service to racial and ethnic minority communities (see definition below).

Minority Institution

A religious or non-profit educational institution. The activities of such institutions must focus predominantly on addressing the religious or educational needs of racial/ethnic minority populations. This category includes minority churches, Historically Black Colleges and Universities (HBCUs), Indian Tribal Colleges, and educational institutions that have an Hispanic enrollment of 25% or more.

Community

A defined geographical area in which persons live and work or a target population which is characterized by: (a) Formal and informal channels or communications (b) formal and informal leadership structures for the purpose of maintaining order and improving conditions. A community should be a responsible catchment area in which to address a population's social and health needs.

Target Population

The population for whom the proposed project is directed. It can be described as a specific racial/ethnic population in a defined geographical area for whom the interventions are planned based on an assessment of their health risks and needs. For the purposes of this grant program racial/ethnic minorities are defined as American Indians/Alaskan Natives, Asians, and Pacific Islanders, Blacks and Hispanics. Racial/ethnic target minority populations must be located within the United States and its territories.

High-Risk Behaviors

The behaviors that increase the risk of infection with HIV and STDs, including unprotected sexual intercourse (homosexual or heterosexual); sharing needles or other drug paraphernalia by people injecting drugs; having numerous sexual partners (homosexual or heterosexual). People who engage in more than one of these behaviors are especially high-risk. For example, individuals who have unprotected sex with someone who injects drugs and shares needles or other "works" or have had numerous homosexual or heterosexual partners are also engaging in "high risk" behaviors.

Intervention

An activity or series of activities implemented to produce positive change in risky behaviors.

Applicant Eligibility

An eligible applicant for this grant program must be a public or private non-profit minority community-based organization, or a minority institution as defined within this announcement (see Definitions). Individuals are not eligible to apply.

Federal demonstration grant support is not expected to result in more than one award in any Metropolitan Statistical Area (MSA) unless an additional project in an MSA is targeted to another of the four major minority groups—American Indians/Alaskan Natives, Asian/Pacific Islanders, Blacks and Hispanics. Efforts will be made to balance geographic, racial/ethnic and HIV infection risk considerations in the distribution or grant awards. Institutions and organizations that develop projects targeting minority homosexual/bisexual men, minority intravenous drug users (IVDUs), the sexual partners of IVDUs, minority adolescents who engage in high risk behaviors or minority women are specifically encouraged to apply.

Example of Grant Program Activities

A broad range of approaches may be considered responsive to this proposal. The following examples are provided to describe possible elements of an acceptable program. A proposed program might include one, all, or none of the examples described below:

(1) Instructions to community professionals and outreach workers, other than those actually served by a local federally funded AIDS Education and Training Center (ETC), to provide HIV infection education and risk reduction. This does not exclude collaborative efforts with such ETC programs;

(2) Mechanisms to encourage volunteers to develop and deliver community-based HIV, and related STD and substance abuse education/prevention out-reach;

(3) Strategies to provide HIV infection, STD and substance abuse education/prevention using a variety of settings such as: hospital emergency rooms, other health care centers, churches, youth shelters, teen centers, adult education centers, detention centers or social service agencies or other community sites;

(4) Activities to enable people who may engage in behaviors which place them at risk for contracting HIV and STD infection to make realistic assessments of their personal health behaviors and their potential for transmitting the virus to others;

(5) Strategies to assist people at risk in planning, negotiating and reinforcing behavior change to prevent HIV and STD infection;

(6) Mechanisms for coodinating community-based HIV and related STD and substance abuse education/prevention activities targeting specific minority population(s) within a specific community;

(7) Strategies for providing technical assistance to other minority community-based organizations.

Program Goal

The goal of this grant program is to demonstrate the effectiveness of education/prevention strategies designed for racial/ethnic minority populations which will help to eliminate or reduce risk for acquiring or transmitting HIV and other health problems that are acquired and/or transmitted via similar risk behaviors, e.g., substance abuse and sexually transmitted diseases. While the emphasis is on information dissemination, of primary interest are those projects that can effectively demonstrate behavior change.

Program Purpose

The purpose of this grant program is to (1) expand the range of minority community-based and minority institutions involved in education/prevention activities relevant to the program goal; (2) encourage innovative approaches that appropriately address the diversity within and among minority populations; and (3) encourage the development and implementation of comprehensive preventive education strategies centered around HIV and related health problems associated with risk behaviors underlying HIV transmission.

Application Process

Applicants wishing to improve the chances for approval should pay particular attention to the general and supplemental instructions provided in the application kit to ensure that this application is responsive to each of the following concerns under the following headings.

Program Objectives

The objectives of this grant program are to fund projects which:

(1) Describe the specific minority target population, the geographic area to be served, and its need for the proposed program;

(2) Include a comprehensive approach that focuses on specific STDs and their link to HIV infection.

(3) Identify the level of service currently available to minorities within the health/social service system, and the enhancements that will result from the grant-supported project;

(4) Demonstrate specific and detailed methods for providing integrated HIV, STD and substance abuse risk behavior education/prevention information in a medium, format, language, and education level which is appropriate for the target population;

(5) Demonstrate coordination and collaboration with existing HIV infection and STD education and prevention resources (e.g., the local or state health department, other community-based organizations, receiving public or private funds to provide HIV education/prevention services);

(6) Document the experience of the organization in minority community service on local or national level;

(7) Monitor and evaluate how the project's specific objectives will be met through the proposed activities.

Review Methods and Review Criteria

Applications and methodology will be screened upon receipt. Those that are judged to be incomplete or non-responsive to the announcement will be returned. Applications judged to be complete and responsive will be reviewed for technical merit by a peer review group in accordance with PHS policies.

All applications will be reviewed and evaluated according to the following criteria (a quantitative indicator of each review criterion appears in parentheses).

Target Population, Needs Assessment and Intervention Plan (20 Points)

1. The need for HIV education/prevention for the targeted population specified by the application;

2. The consistency of the project's goals and objectives with those of the grant program;

3. The appropriateness and feasibility of the intervention strategy, specific activities and methods of implementation proposed for the target populations and the likelihood that they can contribute to the desired behavioral changes;

4. The coherence, detail and explanation of the time phased workplan; population specified by the applicant;

Organizational Capability (25 Points)

5. The organization's capacity to be a credible source of HIV education and prevention (to include related STD and substance abuse risk behavior) for the target population;

6. The organization's capacity to meet the objectives of its proposed program and carry out all proposed activities;

7. The organization's ability and commitment to coordinate its HIV and STD/substance abuse risk behavior education/prevention efforts with other existing resources available for the target populations;

Project Management and Staffing (10 Points)

8. Qualifications and appropriateness of proposed program staff, both paid and voluntary, and adequacy of time allocated for them to accomplish activities;

9. Appropriateness of management plan and qualifications and experience of managers proposed;

Evaluation (20 Points)

10. Existence and adequacy of the plan for evaluating whether the proposed project achieved its objectives, including; (1) The process and outcome indicators which will be used to determine whether the project's objectives have been met, and (2) The approach for obtaining information on the following questions—

(a) What interventions are being provided and to whom?

(b) What are the factors that facilitate or inhibit the implementation of the intervention?

(c) In what ways can the implementation of the intervention be improved?, and

(d) What is the evidence that the intervention will continue beyond the period of grant support?

For second and third project years, noncompeting continuation applications will be evaluated on satisfactory performance in meeting the program objectives as determined by site visits made by Office of Minority Health staff or its representatives, quarterly progress reports, and quality of future plans.

Terms of Conditions and Support

Funds may be used to cover expenses clearly related and necessary to conduct the demonstration project. These expenses include the cost of personnel required to implement the program and the cost of consultants, support services and materials. Funds may not be used for building construction costs or building alterations and renovations. Also, funds may not be used to purchase equipment except as may be acceptably justified in relation to conducting the project.

It is anticipated that additional training may be needed to develop and deliver the education/prevention strategies in the integrated approach required by this announcement. Grant funds may be used to obtain this training through subcontracts with associations or institutions such as:

(a) Minority health professional associations/organizations, e.g., Black Nurses Association (BNA), Hispanic Nurses Association (HNA), National Society for Allied Health, etc.

(b) Minority Colleges and Universities, such as Historically Black Colleges and Universities (HBCUs) or members of the Hispanic Association of Colleges and Universities (HACU)

(c) Health Departments or Health Professions Schools, e.g., Schools of Public Health

Grantees are also encouraged to avail themselves of training opportunities provided by their local AIDS Education Training Center (AETC).

Use of these grant funds to produce or acquire audiovisual material or publications will require the Office of Minority Health to obtain prior approval from the Office of the Assistant Secretary for Public Affairs.

Executive Order 12372 (Intergovernmental Review)

E.O. 12372 sets up a system for State and local review of proposed Federal assistance applications. Applicants (other than federally-recognized Indian tribal governments) should contact their State Single Points of Contact (SPOCs) as early as possible to alert them to the prospective applications and receive any necessary instructions on the State process. A current list of SPOCs is included in the application kit. SPOCs will have 60 days to provide comments and must be received by [seventy days after the application deadline on page 2]. The Office of Minority Health does not guarantee to accommodate or explain for state process recommendations it receives after that

Date. SPOC comments are to be sent to: Office of Minority Health, Grants Management Officer, 5515 Security Lane, Suite 1102, Rockville, MD. The Catalog of Federal Domestic Assistance Number for this program is 93.160.

Dated: April 18, 1991.

William A. Robinson,

Deputy Assistant Secretary for Minority Health.

[FR Doc. 91–9750 Filed 4–24–91; 8:45 am]

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